

No.

2153

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IN THE

2153

United States Circuit Court of Appeals

NINTH CIRCUIT

OREGON COAL & NAVIGATION CO.,

Appellant,

VS.

E. A. ANDERSON and R. B. HERRON,

Appellees.

Upon Appeal from the United States District Court,
District of Oregon.

TRANSCRIPT OF RECORD.

FILED

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IN THE
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NINTH CIRCUIT

OREGON COAL & NAVIGATION CO.,

Appellant,

VS.

E. A. ANDERSON and R. B. HERRON,

Appellees.

Names and Addresses of Attorneys upon this Appeal:

For the Appellant:

J. LeRoy Smith, Yeon Bldg., Portland, Or.

J. M. Upton, Marshfield, Oregon.

For the Appellees:

Jno. F. Hall, Marshfield, Oregon.

A. S. Hammond, Marshfield, Oregon.

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[Order Enlarging Time to File Record.]

Order Extending Time.

January 27, 1912.

*In the District Court of the United States for the
District of Oregon.*

OREGON COAL AND NAVIGATION COM-
PANY,

Appellant,

vs.

E. A. ANDERSON AND R. B. HERRON,

Appellees.

Now, at this time, for good cause shown, it is or-
dered that defendant's time for filing the transcript
and docketing this cause in the United States Circuit
Court of Appeals, Ninth Circuit, be, and the same is
hereby, enlarged and extended to and including the
26 day of February, 1912.

CHAS. E. WOLVERTON,

Judge.

[Endorsed]: Filed Jan. 27, 1912, A. M. Cannon,
Clerk.

..[Order Enlarging Time to File Record.]

*In the District Court of the United States for the
District of Oregon.*

Order Extending Time.

February, 9, 1912.

E. A. ANDERSON AND R. B. HERRON,

Complainant,

vs.

OREGON COAL AND NAVIGATION COM-
PANY,

Defendant.

Now, at this time, for good cause shown, it is ordered that defendant's time for filing the transcript and docketing this cause in the United States Circuit Court of Appeals, Ninth Circuit, be, and the same is hereby, enlarged and extended to and including the 15 day of April, 1912.

CHAS. E. WOLVERTON,

Judge.

[Endorsed]: Filed: Feb. 9, 1912, A. M. Cannon,
Clerk.

[Order Enlarging Time to File Record.]

*In the District Court of the United States for the
District of Oregon.*

Order Extending Time.

April 3, 1912.

E. A. ANDERSON AND R. B. HERRON,

Complainant,

vs.

OREGON COAL AND NAVIGATION COM-
PANY,

Defendant.

Now, at this time, for good cause shown, it is ordered that defendant's time for filing the transcript and docketing this cause in the United States Circuit Court of Appeals, Ninth Circuit, be, and the same is hereby, enlarged and extended to and including the 15th day of June, 1912.

CHAS. E. WOLVERTON,

Judge.

[Endorsed]: Filed Apr. 3, 1912, A. M. Cannon,
Clerk.

*In the District Court of the United States for the
District of Oregon.*

April Term 1907.

Be it remembered, that on the 4th day of October, 1907, there was duly filed in the Circuit Court of the United States for the District of Oregon, a transcript of record on removal from the Circuit Court of the State of Oregon for Coos County, in words and figures as follows, to-wit:

[Stipulation.]

In the Circuit Court of the State of Oregon for Coos County.

Suit in Equity for an Injunction.

Complaint.

E. A. ANDERSON, R. B. HERRON,
Plaintiff's,
vs.

OREGON COAL AND NAVIGATION COM-
PANY, F. S. DOW, PATRICK HENNESY,
Defendants.

Whereas, it appearing that the original complaint in this suit has been lost, and after diligent search cannot be found, now therefore

It is hereby stipulated and agreed by and between the parties to this suit, by their respective attorneys, that the copy of said complaint hereto attached shall be and hereby is substituted for the original complaint heretofore filed herein, and that the same be

filed by the Clerk of this Court and made a part of the record of said suit.

JOHN, F. HALL,
JAMES T. HALL,
A. S. HAMMOND,
Attorneys for Plaintiffs.

J. M. UPTON,
E. L. C. FARRIN,
Attorneys for Defendants.

[Complaint.]

In the Circuit Court of the State of Oregon for Coos County.

Suit in equity for an injunction.

Complaint.

E. A. ANDERSON, R. B. HERRON,
Plaintiffs,

vs.

THE OREGON COAL AND NAVIGATION
COMPANY, F. S. DOW, PATRICK HEN-
NESY,

Defendants.

Come now the plaintiffs and for cause of complaint against the defendants allege:

I.

That the plaintiff, E. A. Anderson, at all times herein mentioned was, and now is, the owner in fee of Lot 16 in Block 65 in Nasburg's Addition (Replatted as Bennett's Addition) to the town of Marshfield,

Coos County, Oregon, as the same is shown upon the plat of said addition as recorded in the office of the County Clerk of said County, in Book 2 of Plats, Page 110, and in Book 3 of Plats, Page 51 of the records of said county.

And the plaintiff, R. B. Herron, is, and at all times herein mentioned, was, the owner in fee of Lot 17 in Block 65 in said addition as the same is shown on said recorded plat.

II.

That said lots are bounded on their Easterly and Northerly side by the low water mark of Coos Bay which is a navigable body of water wherein the tide ebbs and flows and the plaintiffs as owners of said lots, also own, as appurtenant thereto, the right and privilege to build docks or wharves out into the water of Coos Bay to the edge of navigable water; and the principal value of said lots arises from the facts that the owners of said lots have such right and privilege and without said right and privilege said lots would be comparatively worthless.

III.

That the defendant, the Oregon Coal and Navigation Company, is a corporation organized and existing under and by virtue of the laws of the State of California and the defendants F. S. Dow and Patrick Hennesy are its agents in Oregon, residing in Coos County.

IV.

That the defendant, the Oregon Coal and Navigation Company, by its said agents and its employees,

without any right, permission or authority so to do, did, on or about the _____ of March, 1907, secretly, surreptitiously and in the night time, go upon the submerged lands lying between plaintiffs' said lots and the navigable water of Coos Bay and drive therein and thereon numerous piles and posts, which are firmly imbedded in the soil and extend and protrude above the waters of said Coos Bay a distance of from 6 to 12 feet, thus entirely shutting off the plaintiffs from all access to the ship canal and the navigable waters of said Coos Bay:

And the defendants threaten and give forth that they will continue to so drive piles and posts in front of plaintiffs' said lots and that they will place timbers and planks thereon and that they will erect structures thereon that will completely cut off the plaintiffs from and prevent all access to the ship canal and the navigable waters of Coos Bay:

And the plaintiffs believe and so believing allege, that unless prevented by the order of this Court the defendants will so do and plaintiffs allege that such acts will cause great and irreparable damage and injury to plaintiffs and that the amount or extent of such injury could not be measured or ascertained.

V.

That the plaintiffs have no plain, speedy or adequate remedy at law, wherefore plaintiffs pray:

First: For an order of this Court, or Judge thereof, restraining the defendants and their agents, servants and employees from driving any piles or posts or

erecting any structure in front of said described lots or in any way obstructing, occupying or encroaching upon the space between said lots and the ship canal on the navigable waters of Coos Bay; such order to remain in force until the final determination of this.

Second: That upon the final hearing of this cause such order be made perpetual and it be further ordered that the defendants remove all piles or posts so driven by them in front of plaintiffs' property.

Third: That plaintiffs have judgment against the defendants for the cost and disbursement herein.

Fourth: For such other and further relief as to the Court may appear proper.

JOHN F. HALL,
JAMES T. HALL,
A. S. HAMMOND,
Attorneys for Plaintiffs.

State of Oregon,
County of Coos,—ss.

I, E. A. Anderson, being first duly sworn, on oath say, I am one of the plaintiffs in the above entitled suit; I have read the foregoing complaint and the allegations thereof are true.

E. A. ANDERSON,

Subscribed and sworn to before me this 25 day of March, 1907.

[Notarial Seal] MAY R. STAUFF,
State of Oregon,
County of Coos,—ss.

I, A. S. Hammond, one of the attorneys for plaintiffs herein, do hereby certify that the foregoing is a

full, true and correct copy of the original complaint herein and of the whole thereof.

A. S. HAMMOND.

Dated March, 1907.

[Endorsed] No. 2422. In the Circuit Court of the State of Oregon for Coos County. E. A. Anderson, R. B. Herron, plaintiffs, vs. The Oregon Coal and Navigation Company, et al, defendants. Copy complaint, filed Sep. 27, 1907. James Watson, County Clerk. Hall & Hall, A. S. Hammond, attorneys for plaintiffs.

[Undertaking for Injunction.]

*In the Circuit Court of the State of Oregon, in and for the
County of Coos.*

E. A. ANDERSON, R. B. HERRON,

Plaintiffs,

vs.

THE OREGON COAL AND NAVIGATION
COMPANY, F. S. DOW and PATRICK HEN-
NESY,

Defendants.

Whereas, the above named plaintiffs are about to bring a suit in the Circuit Court of the State of Oregon in and for the County of Coos, against the above named defendants, and are about to apply for an injunction in said suit against the defendants enjoining and restraining them from the commission of certain acts as in complaint in this suit are more particularly set forth and described.

Now Therefore, we the undersigned, E. A. Anderson and R. B. Herron, as principals, and Robert Marsden and Frank Bowron, as sureties, in consideration of the premises and of the issuing of said injunction do jointly and severally undertake and promise: that in case said injunction shall issue, the said plaintiffs will pay all costs and disbursements that may be decreed to the defendants, and such damages not exceeding Five Hundred (\$500.00) Dollars as they may sustain by reason of the said injunction, if the same be wrongful or without sufficient cause.

Dated at Marshfield, Coos County, Oregon, this 26th day of March, A. D. 1907.

E. A. ANDERSON, [Seal]

R. B. HERRON, [Seal]

ROBERT MARSDEN, [Seal]

Frank BOWRON, [Seal]

State of Oregon,
County of Coos,—ss.

I, Robert Marsden and Frank Bowron, being duly sworn, say that I am one of the sureties above named; that I am not an officer of any court, and that I am worth the sum of Five Hundred Dollars over and above all just debts, and property exempt from execution.

ROBERT MARSDEN,
FRANK BOWRON.

Subscribed and sworn to before me, this 26th day of March, A. D. 1907.

[Seal]

MAY R. STAUFF,
Notary Public for Oregon.

[Endorsed]: No. 2422. Undertaking for Injunction. Filed March 27, 1907. James Watson, Clerk, by Robert W. Watson, Deputy.

[**Motion and Affidavits for Injunction.**]

*In the Circuit Court of the State of Oregon, in and for the
County of Coos.*

E. A. ANDERSON, R. B. HERRON,
Plaintiffs,
vs.

THE OREGON COAL AND NAVIGATION
COMPANY, F. S. DOW AND PATRICK
HENNESY,
Defendants.

To the Hon. J. W. Hamilton, Judge of the Circuit Court, of the State of Oregon, in and for the County of Coos:

Based upon the complaint herein filed, and the affidavits of E. A. Anderson, R. B. Herron and B. Swanton hereto attached, the plaintiffs by their attorneys moves the Court, for an order of injunction, temporarily enjoining the defendants from the commission of the act, complained of in the complaint, filed herein, to which complaint reference is hereby made as a part of this motion.

That it is necessary that said injunction be granted at once to prevent the said defendants, from the acts complained of in said complaint.

JAMES T. HALL,
JOHN F. HALL,
A. S. HAMMOND,
Attorneys for Plaintiffs.

State of Oregon,
County of Coos,—ss.

I, E. A. Anderson, I, R. B. Herron, being duly sworn, each for himself says that I am one of the plaintiffs above named; that I know the contents of the complaint filed herein; that it is necessary that a temporary injunction be issued in this suit, to prevent the defendants from building a wharf and warehouse, or some other structure in front of the lots, mentioned in complaint; that the said defendants have driven piles in the water of Coos Bay, in front of said lots, and threatened to build a wharf thereon, and if not prevented by an order of this Court will construct a wharf, build a ware-house in front of said lots, and do irreparable injury to these plaintiffs, and cut them off from the navigable waters of Coos Bay; that without the right and privilege of wharfing out to the navigable waters of Coos Bay, said lots are comparatively worthless.

The relative position of said lots to the property of the defendants and to Coos Bay is shown by the plat annexed hereto, and marked exhibit "A", and to which exhibit reference is hereby made.

E. A. ANDERSON.

R. B. HERRON.

Subscribed and sworn to before me, this 26th day of March, A. D. 1907.

[Seal]

MAY R. STAUFF,
Notary Public for Oregon.

State of Oregon,
County of Coos,—ss.

I, B. Swanton, being first duly sworn, say that I am well acquainted with the location of Lots Sixteen and Seventeen (16 and 17) Block Sixty-Five, (65) Nasburg's Addition to Marshfield, (re-platted as Bennett's Addition) that the proposed wharf and piles driven by the Oregon Coal and Navigation Company is in front of said lots, and cuts the said lots off from Coos Bay.

B. SWANTON.

Subscribed and sworn to before me this 26 day of March, 1907.

[Seal]

MAY R. STAUFF.

Notary Public for Oregon.

[Endorsed]: No. 2422. Motion and Affidavits for Injunction. Filed March 27, 1907, James Watson, Clerk, by Robert W. Watson, Deputy.

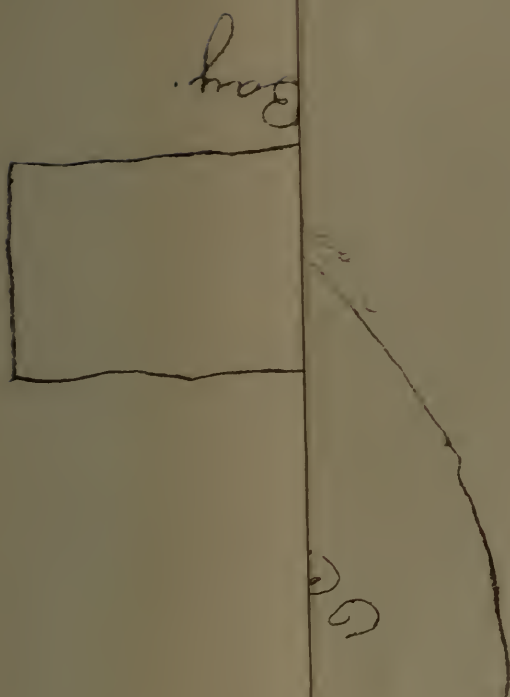
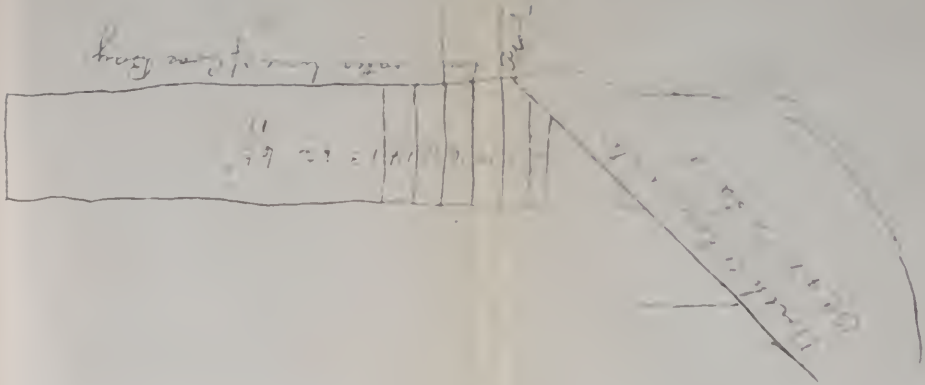
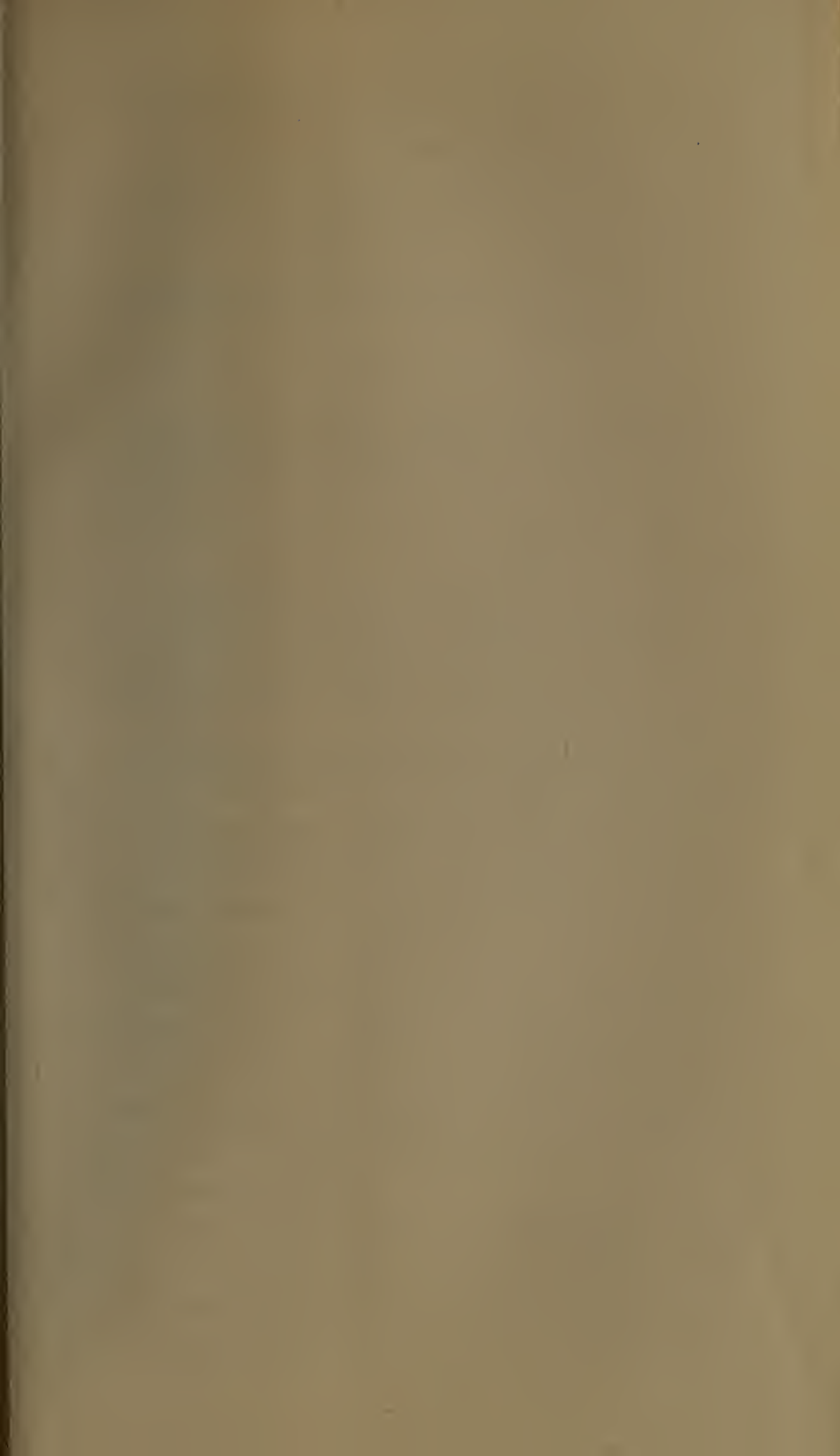


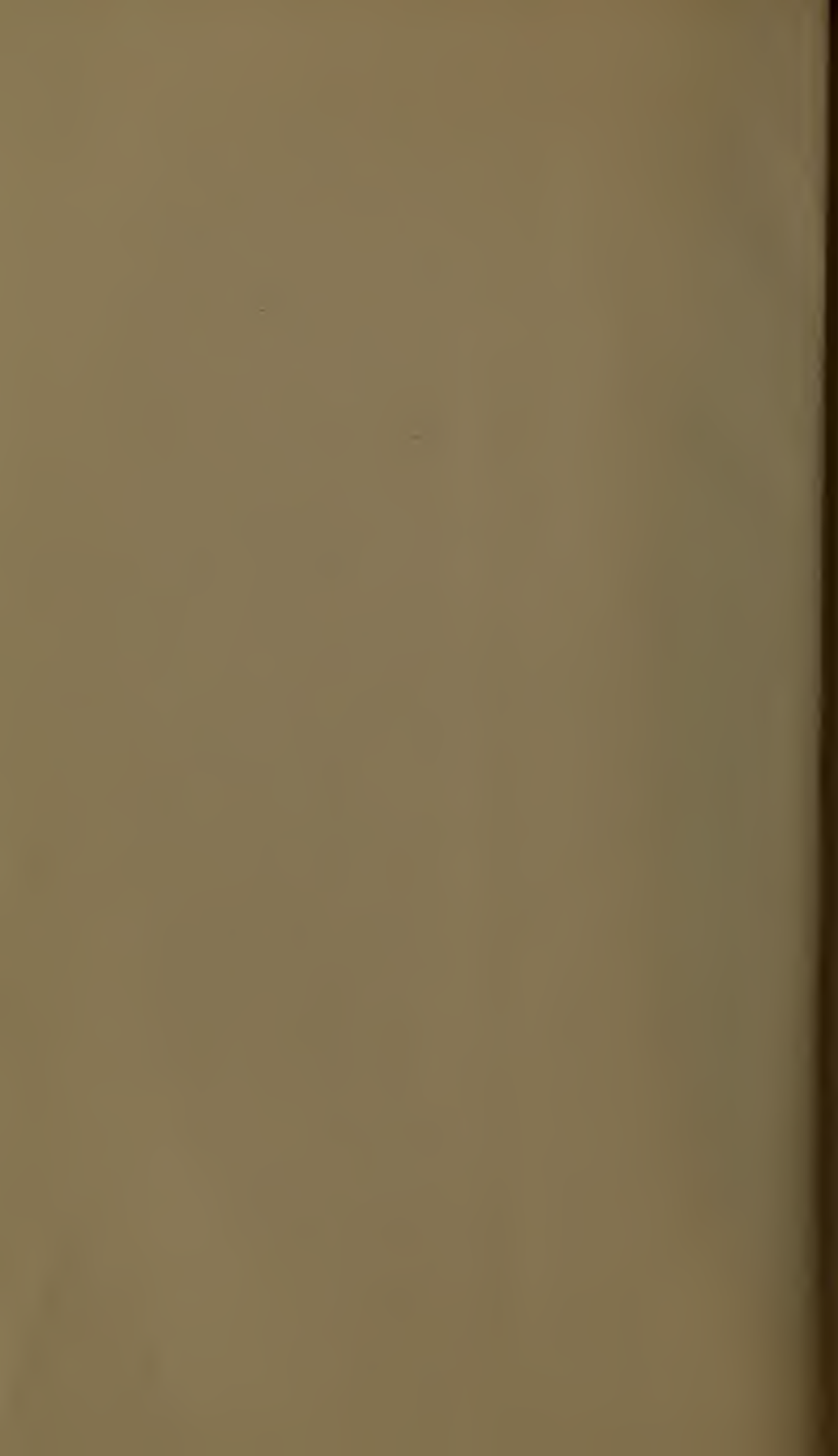
Exhibit "A."



Section line of Stone Quarry
 Dip 10°
 Section line of Stone Quarry

Section line of Stone Quarry





[Order of Injunction.]

*In the Circuit Court of the State of Oregon, in and for the
County of Coos.*

E. A. ANDERSON, R. B. HERRON,

Plaintiffs,

vs.

THE OREGON COAL AND NAVIGATION
COMPANY, F. S. DOW and PATRICK HEN-
NESY,

Defendants.

To THE OREGON COAL AND NAVIGATION
COMPANY, F. S. DOW and PATRICK HEN-
NESY, the above named defendants:

The above named plaintiff having filed their com-
plaint in the Circuit Court of the State of Oregon,
for the County of Coos, against the above named de-
fendants, praying for an injunction requiring them to
refrain from certain acts in complaint and hereinafter
more particularly mentioned.

On reading the complaint in this suit duly verified
and affidavits filed in support of motion for injunc-
tion, it satisfactorily appearing to me therefrom, that
it is a proper case for an injunction; and that sufficient
grounds exists therefor; and that the necessary un-
dertaking has been given,

It is therefore ordered that you—The Oregon Coal
and Navigation Company, F. S. Dow and Patrick
Hennesy, and all your servants, employees and agents,
and all others acting in aid and assistance for you

and each of you, do absolutely desist and refrain from driving any piles or posts, or erecting any structure in front of Lots Sixteen and Seventeen (16 and 17) in Block Sixty-Five (65) in Nasburg's Addition, (re-platted as Bennett's Addition) to the Town of Marshfield, County of Coos and State of Oregon, as the same is shown, upon the plat of said addition, as recorded in the office of the County Clerk of said County, in Book Two (2) of Plats, page One Hundred and Ten (110), and in Book Three (3) of Plats, page Fifty-One (51) of the records of said county, or in any way obstructing, occupying or encroaching upon the space between said lots and the ship channel on the navigable waters of Coos Bay during the pendency of this suit.

Dated at Chambers at Roseburg, Oregon, this 29th day of March, A. D. 1907.

J. W. HAMILTON,
Judge.

It is further ordered that this injunction be served by the Sheriff of Coos County, Oregon; that he make due return of said service in the manner provided by law.

Dated at Chambers at Roseburg, Oregon, this 29th day of March, A. D. 1907.

J. W. HAMILTON,
Judge.

[Endorsed]: No. 2422. Order of Injunction.
Filed Apr. 1, 1907, James Watson, Clerk, by John

F. Hall, James T. Hall, and A. S. Hammond, Attorneys for Plaintiffs.

And afterwards, on the 20 day of April, 1907, the following Sheriff's Return was attached to the Order of Injunction:

*In the Circuit Court of the State of Oregon, in and for the
County of Coos.*

State of Oregon,
County of Coos,—ss.

I, W. W. Gage, Sheriff of the County of Coos, and State of Oregon, do hereby certify that I served the within Writ (Order) of Injunction, within the County of Coos and State of Oregon, on the 4 day of April, 1907, upon defendant F. S. Dow; by delivering to the said defendant in person and personally, at his office in Marshfield, State of Oregon, a copy thereof, prepared and certified to be such copy by James Watson, Clerk of the Circuit Court of the State of Oregon, in and for the County of Coos; that I served the said Writ (Order) of Injunction on the 5 day of April, 1907, in the County of Coos and the State of Oregon, on the defendant "Oregon Coal and Navigation Company" at its office or principal place of business, at New Port, Coos County, Oregon, by delivering to E. E. Morton, agent and clerk of said defendant, whom I found in charge of said office (there being no president, or other head of the defendant, (corporation) secretary, cashier or managing agent, within the County of Coos and State of Oregon upon whom ser-

vice could be made at that time), for and in behalf of said defendants, a copy thereof, prepared and certified to be such copy by James Watson, Clerk of the County of Coos and State of Oregon. I further certify, that I served the within Writ (Order) of Injunction on the defendant Patrick Hennesy, on the 17th day of April, 1907, in the County of Coos and State of Oregon, by delivering to the said Patrick Hennesy, in person and personally, a copy thereof, prepared and certified to by me, as Sheriff; and I further certify that I served the said Writ (Order) of Injunction, within the County of Coos and State of Oregon, on the 17th day of April, 1907, on the defendant Oregon Coal and Navigation Company, at its principal place of business, at New Port, Coos County, Oregon, by delivering to Pat Hennesy, its superintendent and managing agent, personally and in person, for and on behalf of said defendant "Oregon Coal and Navigation Company," a copy thereof, duly certified by me, to be such copy, informing the said Pat Hennesy, that said service was made upon him, as managing agent and superintendent of the defendant "Oregon Coal and Navigation Company," as service on said defendant.

W. W. GAGE,

Sheriff of Coos County, State of Oregon.

*In the Circuit Court of the State of Oregon, in and for the
County of Coos.*

E. A. ANDERSON AND R. B. HERRON,
Plaintiffs,

vs.

THE OREGON COAL AND NAVIGATION
COMPANY, F. S. DOW AND PATRICK
HENNESY,

Defendants.

Now at this time come the defendants above named, by J. M. Upton their attorney, appearing specially for the purpose of excepting to the jurisdiction of the Court over the persons of the said defendants, and for no other purpose, and move the Court for an order thereof quashing the summons herein, for the reason that no summons have been served upon the said defendants or upon either of them.

J. M. UPTON,
Attorney for Defendants.

[Endorsed]: No. 2422. Motion to quash summons. Filed April 10, 1907. James Watson, Clerk, by Robt. W. Watson, Deputy.

*In the Circuit Court of the State of Oregon, in and for the
County of Coos.*

E. A. ANDERSON, R. B. HERRON,
Plaintiffs,

vs.

OREGON COAL AND NAVIGATION COM-
PANY, F. S. DOW, AND PATRICK HEN-
NESY,

Defendants.

Comes now the plaintiffs and moves the Court for an order permitting the Sheriff of Coos county, Oregon, to attach his returns on the service of the injunc-

tion order of the above entitled cause to the original order of injunction. The original order having been filed without the Sheriff's return.

JOHN F. HALL.

JAMES T. HALL.

A. S. HAMMOND.

Attorneys for Plaintiffs.

[Endorsed]: Motion. Filed April 19, 1907. James Watson, Clerk.

[Summons.]

In the Circuit Court of the State of Oregon for Coos County.

E. A. ANDERSON AND R. B. HERRON,

Plaintiffs,

vs.

THE OREGON COAL AND NAVIGATION
COMPANY, F. S. DOW, PATRICK HEN-
NESY,

Defendants.

To the OREGON COAL AND NAVIGATION
COMPANY, F. S. DOW, PATRICK HEN-
NESY, the Above Named Defendants:

In the name of the State of Oregon: You are hereby required to appear and answer the complaint filed against you in the above entitled suit within ten days from the date of the service of this summons upon you, if served within this County, or if served within any other county of this state, then within twenty days from the date of the service of this summons

upon you; and if you fail so to answer for want thereof, the plaintiff will apply to the Court for the relief demanded therein.

JOHN F. HALL,
JAMES T. HALL,
A. S. HAMMOND,
Attorneys for the Plaintiffs.

To the Sheriff of Coos County, State of Oregon:

You are hereby directed to serve only one copy of the complaint in the within entitled suit, and that copy to be served upon the defendant Patrick Hennesy; the other defendants to be served with a copy of summons only.

JOHN F. HALL,
JAMES T. HALL,
A. S. HAMMOND,
Attorneys for Plaintiffs.

Attached to it was a return as follows:

State of Oregon,
County of Coos,—ss.

I, W. W. Gage, Sheriff of the County of Coos and State of Oregon, do hereby certify, that I served the within summons, within the said County of Coos and State of Oregon, on the 4th day of April, 1907, on the within named defendant—F. S. Dow, by delivering a copy thereof prepared and certified to by me as Sheriff, to the said defendant F. S. Dow, in person and personally; that I served the within summons,

within the State of Oregon and County of Coos on the 5th day of April, 1907, upon the defendant "The Oregon Coal and Navigation Company" at its office and principal place of business, at the New Port Coal Mine in Coos County, State of Oregon, by delivering to A. E. Morton, the clerk and agent of said defendant, for and on behalf of said defendants, whom I found in charge of the said office. There being no president or other head of defendant (Corporation) secretary, cashier or managing agent within the County of Coos and State of Oregon, upon whom service could be made at the time; that I further served said summons on the said defendant, "The Oregon Coal and Navigation Company" on the 17th day of April, 1907, within the County of Coos and State of Oregon, by delivering to Patrick Hennesy, Superintendent and Managing Agent of said defendant at the residence of the said defendant at New Port, Coos County, State of Oregon, for and on behalf of said defendant, a copy thereof, prepared and certified by me, as sheriff, there being no president or head of the defendant (Corporation) secretary or cashier, within the County of Coos and State of Oregon upon whom service could be made.

I further certify, that I served the within summons, within the County of Coos and State of Oregon on the 17th day of April, 1907, on the within named defendant Patrick Hennesy by delivering a copy thereof, prepared and certified by me, as Sheriff, together with a copy of the complaint in this suit, prepared and certified to by John F. Hall, one of the attorneys for

the plaintiffs to said Patrick Hennesy in person and personally.

W. W. GAGE,
Sheriff of Coos County, Oregon.

[Endorsed]: No. 2422. Summons. Filed April 20, A. D. 1907, James Watson, Clerk.

[Order.]

E. A. ANDERSON, R. B. HERRON,
Plaintiffs,
vs.

OREGON COAL AND NAVIGATION COM-
PANY, F. S. DOW AND PATRICK HEN-
NESY,
Defendants.

On the motion of plaintiffs, it is hereby ordered that W. W. Gage, Sheriff of Coos County, Oregon, be, and he is hereby, permitted to attach a return of service of the order of injunctin to the original order, the said original order having been filed without a return.

(Journal Signed) J. W. HAMILTON,
Judge.

[Copy of Order of Injunction and Sheriff's Return.]

*In the Circuit Court of the State of Oregon, in and for the
County of Coos.*

E. A. ANDERSON, R. B. HERRON,
Plaintiffs,
vs.

THE OREGON COAL AND NAVIGATION
COMPANY, F. S. DOW AND PATRICK
HENNESY,
Defendants.

To the OREGON COAL AND NAVIGATION
COMPANY, F. S. DOW and PATRICK
the Above Named Defendants:

The above named plaintiffs having filed their complaint in the Circuit Court of the State of Oregon, for the County of Coos, against the above named defendants, praying for an injunction requiring them to refrain from certain acts in the complaint and hereinafter more particularly mentioned.

On reading the complaint in this suit duly verified and affidavits filed in support of motion for injunction, it satisfactorily appearing to me therefrom, that it is a proper case for an injunction; and that sufficient grounds exist therefor; and that the necessary undertaking has been given.

It is therefore ordered that you—The Oregon Coal and Navigation Company, F. S. Dow and Patrick Hennesy, and all your servants, employees and agents, and all others acting in aid and assistance for you and each of you, do absolutely desist and refrain from driving any piles or posts, or erecting any structure in front of Lots Sixteen and Seventeen (16 and 17) in Block Sixty-Five in Nasburg's Addition, (Re-platted as Bennett's Addition) to the Town of Marshfield, County of Coos and State of Oregon, as the same is shown upon the plat of said addition, as recorded in the office of the County Clerk of said County, in Book Two (2) of Plats, Page One Hundred and Ten (110), in Book Three (3) of Plats, Page Fifty-One (51) of the records of said county, or in any way obstructing, occupying or encroaching upon the space

between said lots and the ship channel on the navigable waters of Coos Bay during the pendency of this suit.

Dated at Chambers at Roseburg, Oregon, this 29th day of March, A. D. 1907.

(Order Signed) J. W. HAMILTON,
Judge.

It is further ordered that this injunction be served by the Sheriff of Coos County, Oregon; that he make due return of said service in the manner provided by law.

Dated at Chambers at Roseburg, Oregon, this 29th day of March, A. D. 1907.

(Order signed) J. W. HAMILTON,
Judge.

State of Oregon,

County of Coos,—ss.

I, James Watson, County Clerk, ex-officio Clerk of the Circuit Court of the State of Oregon for Coos County, custodian of the records of said court, do hereby certify that the foregoing transcript of the order of injunction in the foregoing entitled suit has been by me compared with the original order of injunction as the same appears of record in Vol. 11, page 405, thereof, and that the same is a true and correct copy of such original record of such order and the whole thereof.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the Circuit Court for Coos

County, Oregon, this 2nd day of April, A. D. 1907.

(Seal) JAMES WATSON,
Clerk.

Upon which order of injunction appears the following Sheriff's Returns.

State of Oregon,
County of Coos,—ss.

I, W. W. Gage, Sheriff of the County of Coos and State of Oregon, do hereby certify that I served the within Writ (order) of Injunction, within the County of Coos and the State of Oregon, on the 4th day of April, 1907, on the within named defendants, F. S. Dow, and "Oregon Coal and Navigation Company," by delivering to the said defendant F. S. Dow, a copy thereof, duly prepared and certified to be such copy by James Watson, County Clerk of Coos County, Oregon, personally and in person on the 5 day of April, 1907, and by delivering to A. E. Morton, agent and clerk of the defendant "Oregon Coal and Navigation," at the office of said defendant, at New Port, Coos County, State of Oregon, for and in behalf of defendant, "Oregon Coal and Navigation," a copy thereof, duly prepared and certified to be such copy by James Watson, County Clerk of Coos and State of Oregon.

W. W. GAGE,
Sheriff of Coos County, State of Oregon.

[Endorsed]: No. 2422. Sheriff's return. Filed April 20, 1907, James Watson, Clerk.

[Order.]

E. A. ANDERSON, R. B. HERRON,

vs.

OREGON COAL AND NAVIGATION COM-
PANY, F. S. DOW AND PATRICK HEN-
NESY.

The above entitled cause coming on to be heard on motion of defendants to quash service of summons. The plaintiffs appear by John F. Hall, James T. Hall and A. S. Hammond, their attorneys, and the defendants appeared by J. M. Upton and E. L. C. Farin, their attorneys. The court after hearing the argument of counsel finds that said motion should be and the same is hereby overruled.

(Journal Signed) J. W. HAMILTON,
Judge.

[Appearance.]

In the Circuit Court of the State of Oregon for Coos County.

E. A. ANDERSON and R. B. HERRON,

Plaintiffs,

vs.

The OREGON COAL AND NAVIGATION COM-
PANY, F. S. DOW and PATRICK HEN-
NESY,

Defendants.

Now comes Oregon Coal and Navigation Com-
pany, one of the above named defendants, and enters
and files its appearance in the above entitled action

and herewith also files its petition for the removal of said cause and suit into the Circuit Court of the United States in and for the District of Oregon.

OREGON COAL AND NAVIGATION
COMPANY,

By Patrick Hennesy, its General Manager in and
for the State of Oregon.

J. M. UPTON, E. L. C. FARRIN,
Attorneys for said defendant Oregon Coal and Nav-
igation Company.

[Endorsed]: No. 2422. Appearance. Filed April
27, 1907. James Watson, Clerk.

[Petition for Removal.]

In the Circuit Court of the State of Oregon for Coos County.

E. A. ANDERSON and R. B. HERRON,
Plaintiffs,
vs.

The OREGON COAL AND NAVIGATION COM-
PANY, F. S. DOW, and PATRICK HEN-
NESY,

Defendants.

Suit in equity for an injunction. Petition.

To the HONORABLE the CIRCUIT COURT of
the STATE OF OREGON for the COUNTY of
COOS:

Your petitioner, The Oregon Coal and Navigation
Company, respectfully shows:

1. That your petitioner is a party to the above
entitled suit, which said suit, as appears from the

complaint on file herein, is of a civil nature, brought in the above entitled court, in which the said plaintiffs seek by writ of injunction to enjoin the said defendants from driving any piles or posts or erecting any structures in front of the lots numbered seventeen and eighteen, in the block numbered sixty-five, of Nasburg's Addition (Replatted as Bennett's Addition) to the Town of Marshfield, Coos County, Oregon, as the same is shown upon the plat of said addition as recorded in the office of the County Clerk of the said County of Coos, and that heretofore temporary injunction was issued out of the above entitled court and cause restraining the above named defendants from driving said piles or posts or erecting any structure in front of said above described lots, and that said defendants have desisted and still desist from further proceeding in the matter;

2. That in said complaint the said plaintiffs claim and allege that as owners of the lots above described, as an appurtenant thereto, they have the right and privilege to build docks or wharves out into the waters of Coos Bay to the edge of navigable water;

3. That your petitioner is the owner of all of the lands fronting and abutting upon the premises last above described;

4. That the lands so fronting and abutting upon said lots above described are tide lands and are valuable chiefly for the purpose of maintaining thereon wharves and docks;

5. That the matter and amount involved or in dispute in the above entitled suit, exclusive of interest and costs, exceeds the sum or value of two thousand dollars, to-wit: the sum of five thousand dollars;

6. That the above entitled suit is now pending in the Circuit Court of the State of Oregon for the County of Coos, and no proceedings have been taken by your petitioner therein, other than the entering and filing of its appearance in said suit with this petition and its bond for removal of said cause;

7. That at the time of the commencement of said suit your petitioner, The Oregon Coal and Navigation Company, was, and ever since has been and still is a corporation, duly incorporated, created and existing under and by virtue of the laws of the State of California, and is a citizen and resident of said State of California, and is a non-resident of the State of Oregon, and has no other residence than that in the State of California;

8. That at the time of the commencement of said suit, the plaintiffs therein, E. A. Anderson and R. B. Herron, were and ever since have been and now are citizens and residents of the State of Oregon;

9. That at the time of the commencement of said suit there was, ever since has been and still is therein a controversy wholly between citizens of different states, and which can be fully determined as between them, that is to say as between this petitioner, The Oregon Coal and Navigation Company, a citizen of

the State of California, on the one side, and the said plaintiffs, E. A. Anderson and R. B. Herron, citizens of the State of Oregon, on the other side; that the defendants, F. S. Dow and Patrick Hennesy, have no interest in said suit or controversy, or the result thereof, and are not necessary, indispensable or proper parties thereto;

10. That service of process herein was made as against this petitioner, The Oregon Coal and Navigation Company, upon Patrick Hennesy, the general manager of said petitioner in and for the State of Oregon, and no other process was served on this petitioner in said suit or proceeding; that petitioner at the time of the service of said process was not, and is not required by the laws of the State of Oregon or the rules of the above entitled Circuit Court of the State of Oregon for the County of Coos, to answer or plead to the complaint in said action until a day subsequent to the filing of this petition by petitioner;

11. That your petitioner files and offers herewith its bond with good and sufficient sureties in the penal sum of Three Thousand Dollars for its entering in said Circuit Court of the United States for the District of Oregon, on the first day of its next session, a copy of the record in the said action, and for the paying of all costs that may be awarded by the said Circuit Court of the United States, if said Court shall hold that said suit was wrongfully or improperly removed thereto.

Wherefore, your petitioner prays this Honorable

Court to accept said bond as sufficient and to make its order for the removal of said cause to the Circuit Court of the United States, in and for the District of Oregon, pursuant to the Act of Congress in such cases made and provided, and for such other and further order as may be proper, and to cause the record herein to be removed to said Circuit Court of the United States, and that no other or further proceedings be had in said Circuit Court of the State of Oregon for the County of Coos, or that such other order may be made as may be proper.

Dated April 27th, 1907.

THE OREGON COAL AND NAVIGATION
COMPANY,

By PATRICK HENNESY,
Its General Manager in and for the State of Oregon.

J. M. UPTON,

E. L. C. FARRIN,

Attorneys for Petitioner.

State of Oregon,
County of Coos,—ss.

Patrick Hennesy, being first duly sworn, on oath says: that he is the General Manager in and for the State of Oregon, of the Oregon Coal and Navigation Company, a corporation, the petitioner named in the foregoing petition; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and that as to those matters he believes it

to be true; that all of the material allegations in said petition are within his own personal knowledge.

PATRICK HENNESY,

Subscribed and sworn to before me this 25th day of April, 1907, at Coos County, Oregon.

[Seal]

JAMES WATSON,

Clerk.

[Endorsed]: No. 2422. Petition for Removal.
Filed April 27, 1906, James Watson, Clerk.

And afterwards, on the 27th day of April, 1907, there was filed in the office of the said clerk, a bond, in words and figures, following, to-wit:

In the Circuit Court of the State of Oregon for Coos County.

E. A. ANDERSON AND R. B. HERRON,

Plaintiffs,

vs.

THE OREGON COAL AND NAVIGATION
COMPANY, F. S. DOW AND PATRICK
HENNESY,

Defendants.

Know all men by these presents, that we, The Oregon Coal and Navigation Company, a corporation organized and existing under and by virtue of the laws of the State of California, as principal, and J. W. Bennett as surety, are held and firmly bound unto the above named plaintiffs, in the sum of Three Thousand Dollars, lawful money of the United States of America, for the payment of which, well and truly to

be made to the said obligees, their heirs or assigns, we bind ourselves, our and each of our heirs, administrators, successors and assigns, jointly and severally, firmly by these presents.

Witness our hands and seals this 27th day of April, 1907.

The condition of the foregoing obligation is such, that whereas said Oregon Coal and Navigation Company has petitioned the Circuit Court of the State of Oregon for the County of Coos, for the removal to the Circuit Court of the United States in and for the District of Oregon, of a certain cause, suit or proceeding therein pending, and whereas, E. A. Anderson and R. B. Herron are plaintiffs, and the Oregon Coal and Navigation Company, F. S. Dow and Patrick Hennesy are defendants, and which cause, suit or proceeding is numbered 2422.

Now therefore, if the said Oregon Coal and Navigation Company, said petitioner, shall enter in said Circuit Court of the United States in and for the District of Oregon, on the first day of the next session of said court, a copy of the record in said cause, suit or proceeding, and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States, or if said court shall hold that said cause, suit or proceeding, was wrongfully or improperly removed thereto, then this obligation shall be void, otherwise it shall remain in full force and effect.

THE OREGON COAL AND NAVIGATION
COMPANY,

By PATRICK HENNESY,
Its General Manager in and for the State of Oregon.
J. W. BENNETT.

State of Oregon,
County of Coos,—ss.

I, J. W. Bennett, the surety named in the above bond, being duly sworn say: that I am a freeholder and resident within said state, and Worth the sum of Six Thousand Dollars, over and above all my debts and liabilities, exclusive of property exempt from execution or forced sale.

J. W. BENNETT.

Subscribed and sworn to before me this 27th day of April, 1907, at Coos County, Oregon.

[Seal] JAMES WATSON,
Clerk.

The foregoing bears the following endorsements: No. 2422. In the Circuit Court of the State of Oregon in and for the County of Coos. E. A. Anderson, et al, vs. Oregon Coal & Nav. Co., et al. Bond. Filed April 27th, 1907, James Watson, Clerk. J. M. Upton & E. L. C. Farrin, Attorneys for Defendant.

And afterwards, on the 30 day of April, 1907, it being the 8th day of the April term of said court, the following order of removal was made:

[Order.]

E. A. ANDERSON AND R. B. HERRON,
Plaintiffs,

vs.

THE OREGON COAL AND NAVIGATION
COMPANY, F. S. DOW AND PATRICK
HENNESY,

Defendants.

Upon reading and filing the petition and bond of the defendants, The Oregon Coal and Navigation Company, for the removal of the above entitled suit or proceeding to the United States Circuit Court, in and for the District of Oregon, said bond is hereby approved as good and sufficient, and

It is hereby ordered that the said suit or proceeding be, and the same is hereby removed from the Circuit Court of the State of Oregon in and for the County of Coos, to the Circuit Court of the United States, in and for the District of Oregon.

(Journal Signed) J. W. HAMILTON,
Judge.

*In the Circuit Court of the State of Oregon, in and for the
County of Coos.*

[Clerk's Certificate.]

E. A. ANDERSON, R. B. HERRON,
Plaintiffs,

vs.

THE OREGON COAL AND NAVIGATION
COMPANY, F. S. DOW AND PATRICK
HENNESY,

Defendants.

State of Oregon,
County of Coos,—ss.

I, James Watson, County Clerk, ex-officio clerk of

the Circuit Court of the State of Oregon, in and for the County of Coos, do hereby certify that I have prepared the foregoing Transcript on Removal to the United States Circuit Court for the District of Oregon, from the Circuit of the State of Oregon, in and for the County of Coos, in the above entitled cause and embracing the following papers, to-wit:

Complaint, Undertaking on Injunction, Motion and Affidavits for Injunction, Order of Injunction, Sheriff's Return, Motion to Quash Summons, Motion to Attach Sheriff's Return to Order of Injunction, Summons and Sheriff's Return thereof, Order Allowing Sheriff's Return to be Attached to Order of Injunction, Copy of Order of Injunction and Sheriff's Return, Order Overruling Motion to Quash Summons, Appearance, Petition for Removal, Bond for Removal and Order of Removal; that I have compared the said Transcript with the original papers in the above entitled cause on file in my office, together with all the orders made and entered in said cause on the journals of said court and that the same is true and correct Transcript of said original papers and orders and the whole thereof.

I further certify that on the 27th day of April, A. D. 1907, a good and sufficient Undertaking on Removal of said cause in due form of law, on the said removal herein, was filed in this office in said cause.

Witness my hand and the seal of the said court affixed this 28th day of September, A. D. 1907.

JAMES WATSON,
Clerk.

And afterwards, to wit, on the 19 day of October, 1908, there was duly filed in said court, a demurrer in words and figures as follows, to wit:

[Demurrer.]

*In the Circuit Court of the United States for the
District of Oregon.*

E. A. ANDERSON AND JOHN R. HERRON,
Plaintiffs.

vs.

OREGON COAL AND NAVIGATION COM-
PANY,
Defendant.

Now comes the above named defendant and demurs to the complaint on file herein for the reason and on the ground that the same does not state facts sufficient to constitute a cause of suit.

J. M. UPTON and
E. L. C. FARRIN,
Attorneys for Defendant.

[Endorsed]: Demurrer. Filed Oct. 19, 1908, G. H. Marsh, Clerk.

And afterwards, to wit, on Thursday, the 21st day of January, 1909, the same being the 92d judicial day of the regular October 1908 term of said court; present: the Honorable Charles E. Wolverton, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

[Order Overruling Demurrer.]

*In the Circuit Court of the United States for the
District of Oregon.*

No. 3196.

January 21, 1909.

E. A. ANDERSON, ET AL,

vs.

THE OREGON COAL AND NAVIGATION
COMPANY, ET AL.

This cause was heretofore submitted to the Court upon demurrer to the complaint herein without argument, upon written briefs filed by the respective parties hereto; Whereupon, the Court being fully advised in the premises, It is Ordered and Adjudged that said demurrer be, and the same is hereby, overruled; and that the defendant be, and he is hereby, allowed ten days from this date within which to file an answer herein.

And afterwards, to wit, on the 3 day of March, 1909, there was filed in said court an answer in words and figures, as follows, to wit:

[Answer.]

*In the United States Circuit Court for the
District of Oregon.*

Suit in Equity for Injunction.

Answer.

E. A. ANDERSON, R. B. HERRON,

Plaintiffs,

vs.

THE OREGON COAL AND NAVIGATION

COMPANY, F. S. DOW AND PATRICK
HENNESY,

Defendants.

Come now the defendants and for answer to the complaint of plaintiffs herein, admit, deny and allege as follows:

Admit all of the allegations contained in Paragraph III of said complaint;

Deny each and every allegation contained in Paragraphs I, II, IV, and V of said complaint except as hereinafter stated and admitted.

For a further and separate defense to the complaint of plaintiffs herein, defendants allege:

That the defendant The Oregon Coal & Navigation Company is, and at all times since the 15th day of April, 1889, has been, the owner in fee of the following described property, to-wit:

Beginning at N. E. corner of Lot 6 in Block 5, in Town of N. Marshfield, Coos County, Oregon, according to plat of said town prepared by James Aiken and on file in County Clerk's office, and also according to a certain other plat of said Town of Marshfield, on file in County Clerk's office of said Coos County, and prepared by D. Breck in September, 1888; thence due N. to low water mark of Coos Bay; thence in Southeasterly direction along low water line to a point due East of place of beginning; thence due West to place of beginning, together with all the rights and privileges by virtue of being riparian owners, or otherwise, to wharf out in front of said described tract of land, except the following described

portion of said land which was heretofore and to-wit: on the 19th day of May, 1902, conveyed to the Coos Bay Ice & Cold Storage Company, to-wit:

All that certain lot, piece or parcel of land situate in the County of Coos, State of Oregon, and particularly described as follows, to-wit: commencing at the N. E. corner of Delta and Front Streets; thence Northerly along the E. side of Front Street 140 feet; thence Easterly to low water line; thence Southerly along low water line 100 feet to N. line of Delta Street; thence Westerly along N. line of Delta Street to a point of beginning, giving 100 feet of water frontage, same being Town of Marshfield, Oregon.

That as appurtenant to the land above described and by virtue of being riparian owners thereof, the said defendant Oregon Coal & Navigation Company has the right and privilege of wharfing out in front of said premises to the navigable waters of Coos Bay. That the said land above described and the riparian rights and right to wharf out to the navigable waters of Coos Bay appurtenant to said land included all of the land over which the defendants or any of them have driven piles or posts or otherwise exercised acts of dominion.

That the land above described and the riparian rights or right to wharf out to navigable waters of Coos Bay appurtenant thereto, lie in front of the said Lots 16 and 17 in Block 65, of said Nasburg's Addition to the Town of Marshfield, Coos County, Oregon, and between the said lots and the navigable waters of Coos Bay.

For a further and separate defense to the complaint of plaintiffs herein, defendants allege:

The defendant Oregon Coal & Navigation Company now is, and at all times since the 15th day of April, 1889, has been, the owner of and in the actual, visible, exclusive, hostile, open and notorious possession of the following described land, and all of the rights and privileges appurtenant thereof, to-wit:

Beginning at N. W. corner of Lot 6 in Block 5, in town of N. Marshfield, Coos County, Oregon, according to plat of said town prepared by James Aiken and on file in County Clerk's office, and also according to a certain other plat of said town of Marshfield, on file in County Clerk's office of said Coos County, and prepared by D. Breck in September, 1888; thence due N. to low water mark of Coos Bay; thence in Southeasterly direction along low water line to a point due East of place of beginning; thence due West to place of beginning, together with all the rights and privileges by virtue of being riparian owners, or otherwise, to wharf out in front of said described tract of land, except the following described portion of said land which was heretofore and to-wit: on the 18th day of May, 1902, conveying to the Coos Bay Ice & Cold Storage Company, to-wit:

All that certain lot, piece or parcel of land situate in the County of Coos, State of Oregon, and particularly described as follows, to-wit: Commencing at the N. E. corner of Delta and Front Streets; thence Northerly along the E. side of Front Street 140 feet;

thence Easterly to low water line; thence Southerly along low water line 100 feet to N. line of Delta Street; thence Westerly along the N. line of Delta Street to a point of beginning, giving 100 feet of water frontage, same being in Town of Marshfield, Oregon.

That more than ten years prior to the filing of the complaint herein, the defendant Oregon Coal & Navigation Company exercised its right to wharf out in front of its said property on that portion of said premises in front of said Lots 16 and 17, in Block 65, of Nasburg's Addition to the Town of Marshfield, Coos County, Oregon, and between the said Lots 16 and 17 and the navigable waters of Coos Bay, and ever since have been, and now are, in the actual, visible, exclusive, hostile, open and notorious possession thereof.

Wherefore, defendants pray that the temporary injunction heretofore issued herein be dissolved; that the defendants and each of them and all persons claiming by, through or under them be perpetually enjoined from in any way interfering with the use and occupation of said land and the rights appurtenant thereto by the defendants Oregon Coal & Navigation Company, its agents, successors and assigns; that the defendants have judgment against the plaintiffs for their costs and disbursements herein, and for such other and further relief as to the Court may seem proper.

J. M. UPTON,
E. L. C. FARRIN,
GEO. N. FARRIN,
Attorneys for Defendants.

State of Oregon,
County of Coos,—ss.

I, Patrick Hennesy, being first duly sworn, depose and say that I am the managing agent of the defendant corporation, in the above entitled suit, that I make this verification for and on behalf of defendant corporation, and that the foregoing answer is true as I verily believe.

PATRICK HENNESY,

Subscribed and sworn to before me this 24th day of February, 1909.

GEO. M. FARRIN,
Notary Public for the State of Oregon.

[Endorsed]: Answer. Filed March 3rd, 1909,
G. H. Marsh, Clerk.

And afterwards, to wit, on the 15 day of March, 1909,
there was filed in said court a replication in
words and figures, as follows, to wit:

[Replication.]

In the United States Court for the District of Oregon.

E. A. ANDERSON AND R. B. HERRON,
Plaintiffs,

vs

THE OREGON COAL & NAVIGATION CO., F.
S. DOW AND PATRICK HENNESY,
Defendants.

Come now the plaintiffs and for reply to defendant's answer filed herein, deny each and every allegation contained in said answer.

State of Oregon,
County of Coos,—ss.

I, E. A. Anderson, being first duly sworn, on oath say, I am one of the plaintiffs in the above entitled case, I have read the foregoing replication and the allegation thereof are true as I verily believe.

[Seal]

E. A. ANDERSON.

Subscribed and sworn to before me and in my presence this 10 day of March, 1909.

JAMES T. HALL.

I hereby acknowledge service and receipt of copy of this replication at Marshfield, Ore., this 11th day of March, 1909.

J. M. UPTON,
Of Attorneys for Defendants.

[Endorsed]: Replication. U. S. Circuit Court, Filed March 15, 1909, G. H. Marsh, Clerk.

And afterwards, to wit, on Thursday, the 11th day of November, 1909, the same being the 34th judicial day of the regular October 1909 term of said court; present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Order Fixing Time to Take Testimony.]

*In the Circuit Court of the United States in and for the
District of Oregon.*

No. 3196.

November 11, 1909.

E. A. ANDERSON, R. B. HERRON,
Plaintiffs,

vs

THE OREGON COAL AND NAVIGATION
COMPANY, F. S. DOW, PATRICK HEN-
NESY,

Defendants.

On motion and stipulation of the parties plaintiff and defendant in the above entitled cause, it is ordered that Charles B. Selby, United States Commissioner at Marshfield, Oregon, be, and he is hereby, appointed Examiner to take and report the testimony of plaintiffs' and defendants' witnesses in the above entitled cause. That said testimony be taken orally before the said Examiner and reduced to typewriting, signed by the witnesses and returned to this Court.

That unless otherwise ordered, said testimony be returned to the Clerk of this Court on or before March 1st, 1910.

CHAS. E. WOLVERTON,
Judge.

And afterwards, to wit, on the 26th day of February, 1910, there was duly filed in said court, a stipulation in words and figures as follows, to-wit:

[Stipulation Extending Time to Take Testimony.]

*In the Circuit Court of the United States for the
District of Oregon.*

E. A. ANDERSON, R. B. HERRON,
Plaintiffs,

vs

THE OREGON COAL AND NAVIGATION
COMPANY, F. S. DOW AND PATRICK
HENNESY,

Defendants.

Stipulation.

It is hereby stipulated and agreed between the plaintiffs and defendants, by their attorneys, that the time for the taking of testimony in said cause shall be extended to April the 1st, 1910.

Dated this 21st day of February, A. D. 1910.

JOHN F. HALL,
One of Attorneys for Plaintiffs.

J. M. UPTON,
One of Attorneys for Defendants.

[Endorsed]: Stipulation. Filed February 26, 1910, G. H. Marsh, Clerk.

And afterwards, to wit, on Saturday, the 26th day of February, 1910, the same being the 124 judicial day of the regular October 1909 term of said court; present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Order Extending Time to April 1, 1910, in Which
to Take Testimony.]

*In the Circuit Court of the United States for the
District of Oregon.*

Order.

E. A. ANDERSON, R. B. HERRON,

Plaintiffs,

vs

THE OREGON COAL AND NAVIGATION
COMPANY, F. S. DOW AND PATRICK
HENNESY,

Defendants.

Upon stipulation of the parties by their attorneys, it is ordered, that the time for the taking of the testimony in the above entitled suit, be, and the same is hereby extended, until the 1st day of April, A. D. 1910.

CHAS. E. WOLVERTON,

Judge.

And afterwards, to wit, on the 29 day of March, 1910, there was filed in said court, testimony in words and figures, as follows, to wit:

[Testimony Filed in Case.]

*In the Circuit Court of the United States for the
District of Oregon.*

[Stipulation.]

E. A. ANDERSON AND R. B. HERRON,

Plaintiffs,

vs

THE OREGON COAL & NAVIGATION CO.- F.
S. DOW AND PATRICK HENNESY,

Defendants.

It is hereby stipulated by and between the plaintiffs and defendants, that the testimony in the above entitled cause, be taken before Charles B. Selby, U. S. Commissioner, at his office, in Marshfield, Coos County, Oregon, and the said parties by their attorneys, waive notice of the time for taking such testimony, and stipulate and agree, that the taking of same, shall continue from day to day, until completed. And the testimony, so taken, may be read on the trial of said cause, without objections, except such objections to the introduction of particular testimony, which objections shall be noted by the referee, at the time of the taking of the same. All irregularities, as to the time of taking testimony, and as to the manner of the taking of the same is hereby waived.

Dated this 29th day of March, A. D. 1910.

JOHN F. HALL,
A. S. HAMMOND,
JAMES T. HALL,
Attorneys for Plaintiffs.

J. M. UPTON,
E. L. C. FARRIN,
C. N. FARRIN,
Attorneys for Defendants.

[Endorsed]: Filed the 29th day of March, 1910.
Chas. B. Selby, Special Examiner.

*In the Circuit Court of the United States for the
District of Oregon.*

Stipulation.

E. A. ANDERSON AND R. B. HERRON,
Plaintiffs,

vs

THE OREGON COAL & NAVIGATION CO., F.
S. DOW AND PATRICK HENNESY,
Defendants.

It is hereby stipulated between the parties to this cause and their attorneys, that plaintiffs herein are the owners of the property described in the complaint and that the defendants are the owners of the property described in the answer filed in this suit, except in so far as the descriptions of the said premises may conflict, if they do conflict.

JOHN F. HALL,
One of Plaintiffs' Attorneys.

J. M. UPTON,
One of Attorneys for Defendant.

*In the Circuit Court of the United States for the
District of Oregon.*

E. A. ANDERSON AND R. B. HERRON,
Plaintiffs,

vs.

THE OREGON COAL & NAVIGATION CO., F.
S. DOW AND PATRICK HENNESY,
Defendants.

Appeared before Charles B. Selby to take the following testimony; plaintiffs appeared by A. S. Ham-

mond, John F. Hall and James T. Hall, their attorneys, and defendants appeared by J. M. Upton and Farrin & Farrin, their attorneys.

Following witnesses were sworn to testify on behalf of the plaintiffs:

A. N. Gould, S. B. Cathcart, Geo. Rhoda, E. W. Burnett, E. A. Anderson, Jno. Herron.

*In the Circuit Court of the United States for the
District of Oregon.*

Stipulation.

E. A. ANDERSON AND R. B. HERRON,

Plaintiffs,

vs.

THE OREGON COAL & NAVIGATION CO., F.

S. DOW AND PATRICK HENNESY,

Defendants.

It is hereby stipulated between the parties to this cause and their attorneys, that plaintiffs herein are the owners of the property described in the complaint and that the defendants are the owners of the property described in the answer filed in this suit, except in so far as the descriptions of the said premises may conflict, if they do conflict.

JAMES T. HALL,

One of Plaintiffs' Attorneys.

J. M. UPTON,

One of Attorneys for Defendant.

S. B. CATHCART being called as a witness on behalf of the Plaintiffs, after being first duly sworn testified as follows:

Direct Examination.

(By Messrs. HAMMOND and HALL & HALL.)

Q. What is your name, age, residence and occupation?

A. S. B. Cathcart, age 67 years, residence Marshfield, occupation surveyor.

Q. What offices have you held in Coos County, Oregon, during the past 25 years.

A. Part of the time I was County Surveyor, in this County.

Q. For how many years?

A. Twenty.

Q. Are you acquainted with the premises in dispute in this suit?

A. I am.

Q. Have you made a survey of the same?

A. I have.

Q. When?

A. In April 1907 I made one and I have assisted in making another, that was in July 1909, I believe it was.

Q. To where did you make the survey in 1907?

A. Well, I made a partial survey there for P. E. Nicholson of the Cold Storage Plant, I think in 1903.

Q. Did you make a plat of the premises from the survey made by you?

A. I did.

Q. Where is that plat?

A. I have it here?

Q. Please produce the same.

A. As I said, I have a sketch of it here.

Q. Please explain on this plat how you made the survey and the results, showing on the plat, if possible, low water line of Coos Bay as described in the West boundary of defendants' answer.

A. Well, I don't know exactly what the west boundary of their Answer is.

Q. The West boundary of the land of the defendants, according to the Answer filed begins at the Northwest corner of Lot 6 in Block 5 of North Marshfield, (according to the plat of said town prepared by James Aikin and on file in the County Clerk's office and also according to another plat on file in the County Clerk's office prepared by D. Breek in September 1888,) thence due North to low water mark of Coos Bay, thence in a Southeasterly direction along low water line to a point due East of the place of beginning, thence due West to the place of beginning.

A. Yes, I commenced at the Northeast corner of Lot 6 in Block 5 and run North to low water of Coos Bay as shown here on this map.

Q. How many feet did you find between the Northwest corner of said Lot 6 and low water line?

A. 440½ feet.

Q. Was that ordinary or low water line?

A. As near as I could tell, about an average low tide.

Q. I note on this plat figures marked "65" within

lots from 1 to 19; please explain where low water line intersects this Block 65.

A. About the middle of the East end of Lot 18.

Q. The land claimed by the plaintiffs in this suit are Lots 16 and 17 in said Block 65 and I will ask you to follow the line due North from the Northwest corner of said Lot 6 and say if it was anywhere touching either of said lots?

A. It would not, except at a very low tide, it would cut five or six feet perhaps into Lot 17.

Q. That would be at an extreme low tide?

A. Yes, extreme low tide.

Q. But at an ordinary low tide, would it touch Lot 17?

A. It would not touch it, no.

Q. This plat was made from the field notes taken by you at the time you made the survey?

A. Yes, in April, 1907.

Q. You prepared the plat?

Q. Yourself?

A. Yes, sir.

Q. What does this "65" represent?

A. Block 65 in Bennett's Addition to Marshfield.

Q. I note a place on this map marked "Oil Building," will you please explain if you know what that is?

A. That is a house or building occupied by the Standard Oil Co., so far as the corner is concerned next to the shore line there,—

By Mr. UPTON.—We object to any testimony with respect to the oil house wherein the building on

the map is indicated as the oil house, for the reason that the same is incompetent, irrelevant and immaterial.

Answer continued. Well, it shows on here that from low water to the line South of the oil house it would be $13\frac{1}{2}$ feet, where the line projects North it would intersect the South side of the oil house.

Q. Then, if I understand you, the Southeast corner of the oil house is outside of low water mark and also Easterly from the line running North and South?

A. Yes, that's it, extending from low water.

Q. Will you please explain the dots on this map, marked "piling"?

A. That is where I found a lot of piling had been drove that I had understood at the time was in controversy here, and that is just dotted to show approximately where the piling is; didn't measure any individual one, just put it down generally.

Q. Are those piles driven down loosely, without any caps?

A. I didn't notice any caps or anything of the kind on them, they had been drove only a short time before that.

Q. Is this line marked, low water line South 45 degrees East, the true low water line?

A. From where I intersected there up towards the Cold Storage Plant, that was the bearing as close as I could get it. This South or 45, should be North 45, 10 West, it should be North 45 degrees and 10 West instead of South 45-10, should have been North, that is all the difference.

Q. You found that to be the true low water line?

A. About as near as I could get to low water; I placed the instruments and took it each way; sometimes a foot tide will make a great difference in the bearing.

Q. Do these numbers in here represent lots in Block 65?

A. Yes, sir, as near as I could get it; of course I have always understood that the South side of the oil house was built flush with the line of Lot 15.

Q. I also note on this map Block 5 and Northwest corner Lots 6, please explain about that.

A. The data I was furnished to work from in making that survey was to commence at the Northwest corner of Lot 6 of Block 5 in North Marshfield.

Q. Then, if I understand you, the point with the circle, marked Northwest corner Lot 6 is the Northwest corner of Lot 6 of Block 5 in North Marshfield?

A. Yes, sir.

By Mr. HALL.—We offer this map in evidence.

By Mr. UPTON.—We object to the introduction of the map at this time.

By Mr. HALL.—We offer this map on which the witness has testified and ask that the same be marked as Exhibit No. L, over the plaintiff's objection.

By Mr. UPTON.—We object to the introduction of the map for the reason the same is incompetent, irrelevant and for the further reason that the methods adopted as shown by said map and as testified to by the witness as locating and indicating low water line are erroneous.

Q. You will please examine this plat and state whether or not you made the same?

A. Yes, I made that plat from my notes with some additional instruments. On examination of the Bennett Addition, I found out the bearing was given a little different to what I thought and in order to see if it would make such difference I took the bearing here from the South side of the oil house and turned if this was true—a little farther West the Northwest corner of Lot 6 of Block 5, and I found there was a little discrepency and I saw it would throw the line, if this was true—a little further West the Northwest corner of Lot 6 was not exactly due South on the line I had run, providing the Bennett Addition was laid out right, but it only made a very small difference; it threw the line a litttle bit nearer to the North side of Lot 18 of Bennett's Addition—no material difference, by looking at the map you can see it was but very little difference.

Q. In either case, would the West line of the defendants' property touch either of the lots owned by plaintiffs, that is Lots 16 and 17 in Block 65, Bennett's Addition?

A. It would not.

Q. Give as near as you can the approximate distance from the Northeast corner of Lot 17 at mean low water.

A. About seven or eight feet.

Q. Does this figure 5 with the circle around it on the map represent Block 5 in North Marshfield?

A. It does.

Q. And the figure "6" is Lot 6 in said block from which you took your survey described in the defendants' Answer?

A. It is.

Q. When did you last survey this tract of land or assist in surveying it?

A. It was in July, 1909, I believe.

Q. Did you find any material difference in the distance from the Northwest corner of Lot 6 in Block 5 to low water?

A. Less than a foot difference.

Q. How long have you known this particular tract of land?

A. Been acquainted for a great many years, but never paid any particular attention until the surveys was made.

Q. In you opinion has the low water line changed since you became acquainted with the land?

A. I do not think it has materially changed.

Q. If any change, which way has it run?

A. Well, I do not see there is any change, a little sediment has run in from the dredgings but that has not thrown it very far; very little, if any, could not notice any material change.

Q. Do these two plats show, in a general way the low water line in reference to the plaintiffs' and defendants' property in dispute?

A. I think it does, according to my idea or understanding of it.

By Mr. HALL.—We wish to offer this map in evidence.

By Mr. UPTON.—Defendant objects to the introduction of the map, for the reason that the same is incompetent, irrelevant and immaterial and for the reason that the testimony given as to the marks thereon and the map itself as showing the methods adopted in ascertaining and indicating the low water line, are erroneous.

Mr. HALL.—We wish to offer this in evidence over the objection of defendants and ask that it be marked Plaintiffs' Exhibit No. 2.

Q. In ascertaining low water line of Coos Bay, how did you arrive at it?

A. In observing I did not have a tide table when I first made the survey, I took the tide when I thought it would be just about an average run-out, but the last time I was there to make a survey I was with Mr. Gould and we used the tide table at what was mean low tide and how much the tide ran out at that time and we took a point that would be mean low tide that morning.

Q. When was this?

A. The 15th of July, 1909, I believe, can refer to my memorandum and tell. Yes, on the morning of the 16th we took the tide at low water.

Q. You have been accustomed to surveying tide lands and tide flats have you not, for a number of years?

By. Mr UPTON.—Objected to as leading and suggestive of the answer sought.

A. I have.

Q. From your actual experience can you state

whether or not it was low tide at the time you took this observation?

A. Well, to the best of my knowledge, it was.

Cross Examination.

By Mr. UPTON:

Q. In running a line from the Northwest corner of Lot 6 in Block 5 to low water line as you found it, which line is indicated on plaintiff's Exhibit No. 1, did you run due North?

A. I did, as near as I could.

Q. What do you mean by saying "as near as you could?"

A. Well, to explain, I had previously taken the bearings of "A" street and I found it to be almost exactly due East and West and I used that as a basis and run a traverse line down to the corner of Lot 6, Block 5. I used a solar compass in getting the bearing of "A" street.

Q. Explain how you ascertained the location of the Northwest corner of Lot 6, Block 5 as indicated on plaintiff's Exhibit 1.

A. I took it from the Southeast corner of the Marks building, which has been recognized as being a permanent corner of Block 2 of North Marshfield, and I run down from that to get that corner.

Q. You made no surveys and run no other line to ascertain the location of the Northwest corner of Lot 6 in Block 5?

A. That is the only monument that ever I have known as a starting point from North Marshfield, is

the Southeast corner of the Marks building on Front and Third streets.

Q. In making the observations concerning which you testified you made on the 15th or 16th of July 1909, what tide table did you use?

A. One that is in use all around here by people through this country, claimed to be taken as the United States tide table.

Q. Isn't it the tide table that is furnished by Coast Mail Publishing Co., and is supplied to persons who have their advertisements put on the back of it?

A. I could not say as to that.

Q. Isn't it a small vest pocket affair?

A. Do not remember whether I used that one or the one Mr. Gould had, but I compared them with the United States tide tables and I found them correct and have never questioned them.

Q. For what year was that tide table?

A. 1909.

Q. Did you compare 1909 with the official tide table?

A. I do not know as I compared it with that particular one, have never found any difference I compared them and always relied upon them.

Q. And you mean to say you compared all of them—a great many of 1909?

A. No, different years.

Q. Those ordinarily put out by the printers in town?

A. Yes, sir, but I compared the most of them.

(Witness excused.)

S. B. CATHCART.

A. N. GOULD called as a witness on behalf of the plaintiffs, after being first duly sworn, testified as follows:

Direct Examination.

By Mr. HALL:

Q. What is your name, age, residence and occupation?

A. Name, A. N. Gould, residence Coquille, aged 33, occupation surveyor.

Q. What official position do you hold in Coos County at the present time?

A. County Surveyor.

Q. How long have you been County Surveyor?

A. Since July 1908.

Q. How long have you been engaged in surveying work?

A. About eight years.

Q. Did you make a survey of the land in question in this suit, if so when and who assisted you?

A. I did, in July 1909, assisted by S. B. Cathcart.

Q. Did you make a plat of the survey as made at that time?

A. I did.

Q. Please produce it.

(Witness shows plat.)

Q. Is this the plat made by you from the notes taken on the ground at the time you made the survey?

A. Yes, sir.

Q. You will please explain the line of the West

boundary of defendants' land.

A. West boundary of defendants' land, which is the defendant?

Q. Oregon Coal & Navigation Co.

A. This is the line.

Q. The line marked on the map as No. 440 3-10 feet to medium low water?

A. That is it.

Q. You will please explain that portion of the map marked Bennett's Addition, Block 65, and the small figures from one to nineteen.

A. I do not understand you, hardly.

Q. Just what it represents?

A. Represents Block 65; the irregular line marked "mean low water" is mean low tide line and the line marked extreme low water, is extreme low tide line, and the line marked 440.3-10 feet to medium low tide is the line bounding the West of the Oregon Coal & Navigation Company's property.

Q. Does the West line of the Oregon Coal & Navigation Company's property touch either of the Lots 16 or 17 in Block 65, claimed by plaintiffs?

A. It does not.

Q. How far is the West line of the Oregon Coal & Navigation Company's land East of the South line of Lot 17 in Block 65?

A. About 12 or 14 feet.

Q. How would it be if it extended to extreme low low water line?

By. Mr. UPTON.—Objected to as incompetent, irrelevant and immaterial; the extreme low water line

is not in issue.

A. It would probably touch it two or three feet.

Q. Would it touch Lot 16?

A. It would not.

Q. How did you ascertain where the low water line was at the time you made this survey?

A. I set a stake shortly before the tide tables indicating that low water would be, and watched the raise and fall of the water until it had run out, then I measured back an elevation of 1.44-100 feet which gave me a distance of 32.1-10 feet I believe horizontally to get mean low water; this 1.44-100 is given as the mean, both extreme and the mean low water.

Q. About what is the distance between mean low and extreme?

A. 32.1-10 feet measured horizontally and 1.44-100 vertically.

Q. You made this map from your notes made from an actual survey?

A. I did, yes, sir.

By. Mr. HALL.—We wish to offer this map in evidence.

By Mr. UPTON.—Objected to for the reason the same is incompetent, irrelevant and immaterial, and for the reason that the method pursued in ascertaining the West line of the defendants' property and the location and indication of low water mark, are erroneous.

Map is then received in evidence, subject to objection and marked plaintiffs' Exhibit No. 3.

Q. Was the survey from which this map was

made, made at the time S. B. Cathcart assisted you?

A. It was.

No Cross Examination.

(Witness excused)

A. N. GOULD.

E. W. BENNETT being called as a witness on behalf of the plaintiffs, after being first duly sworn, testified as follows:

Direct Examination.

By Mr. HALL:

Q. What is your name, age, residence and occupation?

A. E. W. Bennett, Marshfield, 54 years, occupation raftsmen.

Q. How long have you been engaged in rafting in the waters of Coos Bay?

A. 32 or 33 years.

Q. Are you acquainted with the property in dispute here between the plaintiffs and defendants?

A. I know where it is.

Q. How long have you known this property?

A. I have known the place for years but did not know who it belonged to.

Q. How long have you known the property?

A. Seven or eight years.

Q. You may state whether or not you occupied the property (claimed by the plaintiffs) at any time?

A. Yes, sir, I moved off of it between three and four years ago.

Q. When did you move onto the place?

A. I think I was on there about three years.

Q. From whom did you rent the land?

A. I did not rent from anybody; I asked Mr. Dow if he had any objection; I did not know who it belonged to.

Q. Did you pay any one rent?

A. I paid rent to Mr. Rhoda after I found he owned it.

Q. You paid him rent?

A. Yes, sir.

Q. Do you know when the piles were driven there in front of Lot 16?

A. On that lot where I lived? They were drove after I moved there.

Q. When?

A. They started in on Saturday night and drove all that night and Sunday.

Q. Now, from your acquaintance with this land, has the line of low water changed any?

A. No, I do not think it has filled in any.

Q. Has it washed out any?

A. I could not hardly say, do not think it has changed any.

Q. You do not think there is any change at all?

A. No, do not think there is.

Q. You may state how you came to move away from there?

By Mr. UPTON.—Objected to as incompetent, irrelevant and immaterial.

A. I think Mr. Anderson told me to move off.

Q. You moved off at his request?

A. Yes.

Q. Were you located on this Lot 16 or in front of it?

A. Right along side of the oil house.

Q. On the tide land itself?

A. No, in deep water, I was right on deep water.

Q. And you paid Mr. Rhoda rent?

A. Yes, sir.

Q. Do you know who drove those piles that were driven there?

A. No, I just saw them driving them.

Cross Examination.

By Mr. UPTON:

Q. You state you asked permission of Mr. Dow to put your scow there?

A. It was not a scow, but a big float.

Q. You asked permission of Mr. Dow to put that there?

A. Yes, sir.

Q. Who is Mr. Dow, what position does he hold with respect to the defendant O. C. & N. Co.?

A. He is agent for the Standard Oil Co.

Q. You know he is the agent for the Oregon Coal & Navigation Co.

A. I know he is agent for the steamboat.

Q. When was it Mr. Anderson told you to get oil?

A. Well, we must have been in there, I could not say, about three years ago a little over, three years and a half, in the winter time.

Q. You were lying immediately along side of the Standard Oil Company's building?

A. Right along adjoining the piles on the South side—we got a dolphin.

Q. That dolphin is South of the Standard Oil building and in front of the lots in question, isn't it?

A. Yes, sir.

Q. That dolphin was there before the piles you spoke of were driven?

A. Yes, when I moved on it.

Q. As a matter of fact has been there for a good many years.

A. Do not know how much longer, they drove it there to give boats a chance to tie up.

Re-Direct Examination.

By Mr. HALL:

Q. You spoke of a dolphin having been driven there; please explain what a dolphin is?

A. Bunch of piling.

Q. How many piles?

A. I think four or five.

Q. Was this dolphin you spoke of driven near the land or in deep water?

A. Right in line with the East side of the warehouse.

Q. Is it in deep water?

A. Oh, yes, the boats land right along side of it.

Re-Cross Examination.

Q. The piles you speak of were driven in deep water, in line with the wharf line?

A. Which piles?

Q. That you saw them drive there.

A. Yes, sir, they stand in deep water, I guess, all of them.

Re-Direct Examination.

Q. Those piles are inside of the dolphin toward the shore, are they not?

A. Yes, sir.

Re-Cross Examination.

Q. How far is the outer row of piling inside of the dolphin?

A. They drove piling from the dolphin West.

Q. And South?

A. Well, they filled in there along side of the warehouse, do not know how far they were drove in.

Q. How far inside of the dolphin were the outer line of the piles you say were driven?

A. That, I could not tell.

Q. As a matter of fact were they not practically on a line running North and South with the dolphin?

A. From the dolphin to the warehouse you mean?

Q. Yes, and from the dolphin South.

A. From the dolphin there is no piles South.

Q. Then, from the dolphin North?

A. There is a row of piles from the dolphin North connecting with the warehouse.

(Witness excused.)

E. M. BERNETT.

GEORGE RHODA, being called as a witness on behalf of the plaintiffs, after being first duly sworn, testified as follows:

Direct Examination.

(By Mr. HALL.)

Q. What is your name, age, residence and occupation?

A. George Rhoda, age 55, occupation, on the ferry-boat, deck hand.

Q. How long have you know the property in dispute between the plaintiffs and defendants herein?

A. Well, I think about a year or two.

Q. How long have you known this property, since you first saw the property?

A. About five or six years ago, and more.

Q. Were you ever the owner of the property?

A. Yes, sir.

Q. How long?

A. About one year and a half.

Q. When was that?

A. Must be about four or five years ago.

Q. During the time you owned it, did you rent it to anybody and collect rent?

A. Yes, sir, I did.

Q. Who to?

A. To W. M. Burnett.

Q. Is that the raftsmen?

A. Yes, sir.

Q. You will please explain what was done with it by Mr. Burnett and where he kept his raft?

By Mr. UPTON.—Objected to as incompetent, ir-

relevant and immaterial.

A. He had it laid right in front of my property.

Q. Do you know where the low water line is in front of that property?

A. Pretty near.

Q. Has the line changed any since you have known it?

A. No, not much, if any.

Cross Examination.

(By Mr. UPTON.)

Q. You owned only Lot 16 did you not?

A. Yes, sir.

(Witness excused.)

GEORGE RHODA.

J. W. BENNETT being called as a witness on behalf of plaintiffs, after being first duly sworn, testified as follows:

Direct Examination.

(By Mr. HALL.)

Q. State your name, age, residence and occupation.

A. J. W. Bennett, age 54 years, residence Marshfield, Coos County, Oregon, occupation, Attorney at Law.

Q. Are you acquainted with the land in dispute in this suit?

A. I think I am.

Q. You were formerly owner of the lands owned by plaintiffs, were you not?

A. Yes, sir.

Q. And you caused the same to be platted?

A. Yes, sir.

Q. You will please examine this plat and state whether or not that is a correct plat of the lands, as platted by you?

A. Yes, sir, this is a blue print of the platted portion of the original, which probably or undoubtedly are on file in the Recorder's office.

Q. I will ask you if this line here, marked North of low water is the correct line between the lands owned by the Oregon Coal and Navigation Co., and the Bennett Addition to Marshfield.

By Mr. UPTON.—Objected to as incompetent, irrelevant and immaterial as the witness has not qualified himself to testify with reference to this.

A. This Bennett Addition plat is included in what was known as the Nasburg Addition to Marshfield and at the time Nasburg and myself caused the land to be platted. We instructed these surveyors to lay it off on the ground, as well as on paper and to mark it on the ground, which I believe they did, and I instructed them particularly with regard to finding the low water line, in view of that description of the Oregon Coal & Navigation Company's land adjoining, and he made this map or made the Nasburg map, of which this is a portion, in pursuance with instructions and that is where he located the boundary line.

By Mr. UPTON.—Defendants move to strike out the whole of witness' testimony for the reason it is not responsive to the question asked and is incom-

petent, irrelevant and immaterial.

Q. You will please explain the map thoroughly, particularly as to Block Sixty-Five (65) in Bennett's Addition to the Oregon Coal & Navigation Company's land, how you came to have it surveyed and platted and how it was made.

By Mr. UPTON.—Objected to as incompetent, immaterial and irrelevant.

A. I wanted to sell lots there and wanted to know where the line between the land owned by the Oregon Coal & Navigation Company was, and the Bennett Addition and I instructed the surveyor, Mr. Campbell, I believe, particularly in regard to arriving at the low water mark point as shown in front of Lot 18 in Block 65 of said Bennett's Addition, as I intended to sell lots by that line and wanted to be sure and give a good title.

Q. Has there been any material change in the low water line in front of Lots 16 and 17 in the past 20 years, to your knowledge?

A. I do not think there has, for the reason it is my recollection that Coos River flows (and has for years, probably a hundred years for all I know) past this same property and my recollection now is that the bedrock is within a foot of the top of the mud where Front Street is located and I think it shallows off, altho' there is some mud there. My idea would be from casually looking at it, that low water mark remains about the same.

Q. You say that that plat you hold in your hands at the present time, represents low water line as it

did at the time that survey was made, and practically at the present time?

A. That is my opinion but I could not tell without making a survey.

Q. You are acquainted with this property, are you not?

A. Yes, sir.

Q. You see it frequently?

A. Yes, sir.

Q. If any material changes you would be apt to notice them?

A. If I went at low tide I would, but I do not think there is.

By Mr. HALL.—We offer this map in evidence.

By Mr. UPTON.—We object to the introduction of the map for the reason that the same is incompetent, irrelevant and immaterial to prove any of the issues made by the plattings.

(Map is offered in evidence, subject to objection and marked Plaintiff's Exhibit 4.)

Cross Examination.

(By Mr. UPTON.)

Q. Did you ever make any observation or observations for the purpose of ascertaining or determining about where low water line was on the land?

A. I do not think I did, except that at the time the plat was made, I think Mr. Nasburg and myself went down there.

Q. You base your conclusion on your observation at that time?

A. Principally, we hired that man to make that map and told him what we wanted; we did not instruct him to do anything but just find low water line where that line runs up into low water line.

(Witness excused.)

J. W. BENNETT.

E. A. ANDERSON, one of the plaintiffs in the above entitled cause, called as a witness in his own behalf, and after being first duly sworn, testified as follows:

Direct Examination.

(By Mr. HALL.)

Q. State your name, age, residence and occupation.

A. E. A. Anderson, do not know what my occupation is, am not doing anything, dabbling in real estate a little bit, age is 68.

Q. Are you one of the plaintiffs in this suit?

A. Yes, I am.

Q. Which one of the lots in question do you own?

A. I own Lot 16, Block 65, Nasburg's,—or Bennett's Addition.

Q. How long have you been acquainted with this lot?

A. Oh, I have been acquainted with that ground for forty years I know; I owned the ground above that for over 30 years.

Q. Are you acquainted and familiar with the low water line?

A. Yes, I have been there at all stages of the tide

waiting for high tide and low tide, all kinds of tides: I run a coal scow in there for about 25 years.

Q. Has there been any material change in the location of the low water line?

A. No change, not that portion of the town. I bought that with the understanding I was to use it as a coal yard, for the very reason that when they filled in front of my other property there with the dredge, the dredgings run in on my property and raised that position of the mud flat; no material change at all, on Lot 16, Block 65.

Q. When you speak of the dredgings running in, you meant the upper lot, not the lot in question?

A. No, it was not near it then. That is the lot in question.

Q. There has been some piling driven in front of your lot and also of Lot 17; will you please explain when and how that was driven?

By Mr. UPTON.—Objected to as incompetent, irrelevant and immaterial.

A. It was in 1907, just exactly the time of the year I cannot say, but it was in the winter time sometime the piling was driven. They went in there at midnight Saturday night and drove all that night and Sunday and Monday Mr. Hall came to me and said, "you are improving your property I see, you are driving piling." I said, well if I am I don't know it. I went down there and they were whacking away on the piles and I put a stop to it, if I had know it sooner would have been there before.

Q. Do you know at whose instance those piles were driven?

By Mr. UPTON.—Objected to as incompetent, irrelevant and immaterial.

A. I do not know exactly, but I think at the instance of Dow and Hennessy.

Q. Two of the defendants in this suit?

A. Yes, sir.

Q. Were those piles driven with your consent?

A. No, oh, no—I would have had them working day time if it was.

Q. What is this property principally valuable for?

By Mr. UPTON.—Objected to as incompetent, irrelevant and immaterial.

A. Valuable for any water front business or Front Street business, either one.

Q. What effect would it have on either one of these lots in question, if shut off from the water front?

By Mr. UPTON.—Objected to as incompetent, irrelevant and immaterial.

A. It would depreciate the value of the lots and make them worthless for any water front business.

Q. Then, as I understand you, the lots are principally valuable on account of the water front?

By Mr. UPTON.—Objected to for the reason that the same is incompetent, irrelevant and immaterial.

A. Yes, for their water front.

Q. These lots go out to deep water in front of these lots?

By Mr. UPTON.—Objected to as incompetent, irrelevant and immaterial, as leading and suggestive

of the answer sought.

A. Oh yes, they lead out to deep water.

Q. If these obstructions were allowed to remain would they interfere with the use of these lots and prevent you from getting out to deep water?

By. Mr. UPTON.—Objected to as incompetent, irrelevant and immaterial.

A. I could not use them at all for the purpose I intended, for floating a scow, it could not get in at all.

Q. I will ask you whether or not these piles are driven near the ship channel?

By. Mr. UPTON.—Objected to as incompetent, irrelevant and immaterial.

A. Yes, pretty close to the ship channel and driven in too, at low water mark.

Q. Could ships have come up to the lots?

By. Mr. UPTON.—Objected to as incompetent, irrelevant and immaterial.

A. Oh yes, they could have.

Q. Did the piling driven by the defendants interfere with the view?

By. Mr. UPTON.—Objected to as incompetent, irrelevant and immaterial.

A. They stuck all the sticks they could find, it looked like.

Q. Please describe these sticks and state whether or not they are for a permanent wharf?

By Mr. UPTON.—Objected to as incompetent, irrelevant and immaterial.

A. They look like small telegraph poles and are not fit for a wharf and not fit for a structure of any

weight, anybody can go and see that

Cross Examination.

(By Mr. UPTON.)

Q. Did you ever measure or estimate the timber, the smallest ones that are driven?

A. I never went out and measured them, can see them without going out.

Q. What could you see?

A. I could see some of them were piles and some of them as small as 10 inches.

Q. How far distant was this?

A. I did not go down to them, some of them I guess were smaller at the top than ten inches and some smaller at the bottom.

Q. Could you see the bottom part of these piles?

A. No, I mean at low water you could see.

Q. At low water could you see the piles?

A. Certainly, when the tide was down you could see they were smaller, as the water drops down.

Q. You think you have seen one pile there that is as small as ten inches?

A. Many of them too small for any structure or to place a dock on, no sane man would have driven them for a dock or a house.

Q. How many were there?

A. I do not know, I never counted the piling.

Q. Estimate the number?

A. I could not estimate them for I never counted them.

Q. You say all the piles there would not support a

house?

A. Not support a building of any weight.

Q. How far apart were they?

A. I could not tell you, never went to look at them.

Q. Were there 100 piles there?

A. I do not know, I cannot make a guess whether 100, 75, or 80.

Q. Are you prepared to say there is no piling there 14 inches in diameter?

A. Not prepared to say any such thing; they took everything they could get and stuck in the ground.

Q. When you say it would not support a house, what do you base that on?

A. I base my conclusions from the house adjoining, they drove piles there and look at it, when they put a few barrels of oil in there you can see it is settling down.

Q. What do you mean by the house along side of it?

A. I mean the oil house.

Q. Isn't it a fact that that warehouse has been used for a number of years for flour and grain?

A. It has been used, but never any great weight put in it; I used to haul freight away from there.

Q. Was it not used for storage at all?

A. Oh, at times, hay and feed.

Q. And flour?

A. Some flour.

Q. How much?

A. I could not tell you how much flour.

Q. Isn't it a fact you have seen on many occasions, the entire floor covered with iron tanks of oil, kerosene, gasoline, etc.?

A. Certainly I have seen oil in there.

Q. Isn't it a fact that the Standard Oil Co. uses that warehouse and has used it for a long time for the storage of all of its oil supplying Coos Bay, and that it receives large cargos at extended intervals on sailing vessels, because passenger steamers cannot carry it?

A. They do not carry so much as they did; if they keep on putting it in there it will fall down.

Q. Are they scared?

A. Well, I would be, I do not know if they have any judgment about it, whether it would fall down or not.

Q. How far South of the lots involved in this suit was your coal slip that you spoke of?

A. Quite a ways, do not know how many blocks, Must be three blocks, on the fourth block I think, I do not know the distance, you all know where it is.

Re-Direct Examination.

(By Mr. HALL.)

Q. You spoke of this warehouse not being in proper condition, you will please describe the warehouse as near as you can, the size and also the condition.

A. Well, the warehouse, the piling driven for the warehouse was driven with the intention of building on, and the lots in question, the piles were driven to try and confiscate the lot.

By Mr. UPTON.—Move to strike out the answer of the witness for the reason the same is not responsive.

Answer continued. As to the oil house, it does not take much of an eye to see how it is going and settling.

Q. About what is the length and width of the oil house?

A. I do not know, I suppose it would be, well the building is probably 80 feet, I think about 50x80.

Q. And it has settled out of shape?

A. It has settled everywhere out of shape.

Q. This warehouse is along side of your lot?

A. Yes, right North I think it is on a portion of Lots 14 or 15, I do not know which.

Q. And the warehouse property is principally valuable for warehouse purposes?

By Mr. UPTON.—Objected to as incompetent, irrelevant and immaterial and for the further reason it is leading and suggestive of the answer sought.

A. Yes, sir.

Q. Is your lot and the lot adjoining belonging to the plaintiff Herron, valuable for warehouse properties?

By Mr. UPTON.—Objected to as leading.

A. Oh, yes, that is what it is fit for.

Q. The channel passing these lots is the main ship channel to the sea?

By Mr. UPTON.—Objected to as leading and suggestive of the answer sought.

A. Oh yes, right by the ships' channel.

Re-Cross Examination.

(By Mr. UPTON.)

Q. Did you examine the piles under the warehouse?

A. No, I have no business under there.

Q. What is the size of them?

A. Look to be pretty large piles; I never went there to measure the piles, none of my business what kind of piles they have under there.

Q. Isn't it a fact that the warehouse settled on one corner and that is because the piles were not driven deep enough, and they settled five or six years ago?

A. If you cannot see it is crooked on more than one corner, you must have poor eyes for levels.

Q. So you do not know whether it is the want of a sufficient number of piles or because of the smallness of the piles used, that resulted in the settling?

A. No, I cannot judge that.

Q. Or because they were not driven deep enough?

A. I cannot tell you; those driven on the lots were just stuck in the ground.

Q. Did you see them stick any of them in the ground?

A. Yes, sir, I got there before they got done and forbide them going any further. I would probably have got down Sunday and told them if I had known it, but I didn't know it.

(Witness excused.)

(Plaintiff rests.)

E. A. ANDERSON.

Defendant wished adjournment until 10:00 o'clock A. M. following day.

At the appointed time, 10:00 o'clock A. M., March 30th, both parties appeared and defendants announced they rested and would introduce no testimony; and at the same time plaintiffs announced that they wished to introduce further testimony on their behalf, whereupon they adjourned until 2:30 P. M. the same day, to the introduction of which further testimony defendants object.

At 2:30 P. M., March 30th, the parties appeared and plaintiffs introduced the following testimony:

G. A. BENNETT being first duly sworn, testified on behalf of the plaintiffs.

Direct Examination.

(By Mr. HALL.)

Q. State your name, age, residence and occupation.

A. G. A. Bennett, age 53, residence Marshfield, occupation editor, Coos Bay News.

Q. Are you acquainted with the Marks building on the Southeast corner of Block 8 in North Marshfield?

By Mr. UPTON.—Objected to as incompetent, irrelevant and immaterial.

A. Yes, you mean where Dow's office is.

Q. How long has that building been there?

By Mr. UPTON.—Objected to as incompetent, irrelevant and immaterial.

A. It was built in '82 and '83, I think finished in '83.

Q. You may state whether or not you know that is on the corner of the block?

By Mr. UPTON.—Objected to as incompetent, irrelevant and immaterial.

A. All I know is, I was down there one day and was talking to Mr. Mark, the owner of the property, about lines and I asked “how did you fix it about this building?” He said we put this on the regular survey. Well, I said, you won’t have any trouble with the Clemmons plat. We didn’t talk any further about it, but I remember asking him the question and as near as I could understand he was careful to get it on the line.

Q. Has that corner been recognized as the corner of the block ever since it was built?

By Mr. UPTON.—Objected to as incompetent, irrelevant and immaterial.

A. We have understood it was. I understood from the city surveyor he took the line from that corner and allowed us seven or eight feet on what used to be Pine Street.

Q. The City of Marshfield recognizes that as the true corner of Block Eight?

By Mr. UPTON.—Objected to for the reason that the same is leading and suggestive of the answer sought, and is incompetent, irrelevant and immaterial.

A. The reason I supposed they did, I was speaking with the surveyor when he was blocking the street they used to call Third Street, he said you own seven or eight feet of this Pine Street and then he

said it runs into Mrs. Hirst's lot about 12 feet or something like that.

(Witness excused.)

G. A. BENNETT.

JOHN BEAR being called as a witness on behalf of plaintiff, after being first duly sworn, testified as follows:

Direct Examination.

(By Mr. HALL.)

Q. What is your name, age, residence and occupation?

A. My name is Jno. Bear, I have been in the livery business this last 24 years in Marshfield, Coos County, Oregon.

Q. How long have you resided in Marshfield?

A. 1867, since that most of my time has been in Marshfield.

Q. Are you acquainted with the plat of North Marshfield, as originally laid out?

A. Well, yes, I am pretty well acquainted with the survey we made on Front Street, know all about it, I do not know what changes made lately.

Q. Were you here at the time Ef Marks built the building which now stands on the Southeast corner of Block Eight in North Marshfield, the building in which the steamship company now has its office?

A. Yes, I was in Marshfield at that time.

Q. Do you know whether or not the Southeast corner of that building was put on the Southeast cor-

ner of the block?

By Mr. UPTON.—Objected to for the reason the same is incompetent, irrelevant and immaterial.

A. The Southeast corner is right on that corner where the first survey was, the building was put in right on the corner.

Q. Has that corner been recognized at all times since that date as the true corner of that block?

By Mr. UPTON.—Objected to as incompetent, irrelevant and immaterial, witness has not qualified himself to answer the question.

A. Yes, as far as I know, always been.

Q. You may state whether or not you have any knowledge as to that being the basis from which all the buildings on Front Street and Third Street has been constructed since that was built?

By Mr. UPTON.—Objected to as incompetent, irrelevant and immaterial.

A. Front Street and Pine Street, Pine Street runs to the West.

Q. Front Street is in front of the building?

A. Yes, that is the corner of Third Street and Front Street, that is right on the corner.

Q. Has that been used as a basis for the location of other lots and buildings since the date of the construction of this building?

By Mr. UPTON.—Objected to as incompetent, irrelevant and immaterial.

A. That has been used, what we call the Marks property, they put up the front building and the little one behind, they put the foundations in about the

same time.

Q. These Marks buildings were placed on the lots soon after the survey was made?

By Mr. UPTON.—Objected to for the reason that the question is leading and suggestive of the answer sought and for the further reason it is incompetent, irrelevant and immaterial.

A. Yes, I think the survey was made in 1873, near as I can remember, I was interested in the survey in 1873. That's the time near as I can remember.

Q. You may state how you know this building was placed on the corner?

By Mr. UPTON.—Objected to as incompetent, irrelevant and immaterial.

A. How I know? I was interested in the survey of the town, I know how every lot was surveyed, I followed the survey, me and Mr. Nasburg and Mr. Walker, right through the Front Street and every building along there, why I know the corners.

(Witness excused.)

JOHN BEAR.

S. B. CATHCART recalled as a witness on behalf of the plaintiff.

Re-Direct Examination.

(By Mr. HALL.)

Q. Mr. Cathcart, in your testimony yesterday you stated that in beginning the survey for the purpose of establishing the Northwest corner of Lot 6 in Block 5 in North Marshfield, you began at the Southeast corner of Block 2 in North Marshfield, you will

please explain why you commenced at this point?

By Mr. UPTON.—Objected to for the reason the witness never testified that he began at the point indicated in the question, and for the further reason it is incompetent, irrelevant and immaterial.

A. Well, I inadvertantly called it Block 2, it was Block 8, my notes show that, I got it in my head and unfortunately called it wrong at that time. I took for my basis to work from, the Southeast corner of Block 8, and I started in on "A" Street, that is where I originally started as a basis, as there is nothing down below from which I could get a true North course, and having frequently at times before that, not frequently, but two or three times, with a solar compass, I had taken the bearings of "A" Street and found it very nearly East and West and I used that as the basis to get my course, but I used the Marks building on the Southeast corner of Block Eight as the point to measure from to get the Northwest corner of Lot 6, Block 5.

Q. You may state what information you had as to whether this is a true corner of said Block Eight?

By Mr. UPTON.—Objected to for the reason it is incompetent, irrelevant and immaterial.

A. Well, from a general understanding we always had, I understood that was placed on the corner and when I was making the survey for Marshfield, Mr. Hirst told me the Marks building was exactly correct and I took his word for it.

Q. Who is Mr. Hirst you speak of?

A. Thos. Hirst, he was in the mercantile busi-

ness at one time here.

Q. You may state whether he was here at the time the suveys were made?

A. Yes he was; he resided here as far back as 1870, am pretty well satisfied he was here when I came.

Q. Will ask you whether this corner has been recognized as the true Southeast corner of Block Eight?

By Mr. UPTON.—Objected to as incompetent, irrelevant and immaterial.

A. Always been my understanding in all discussions of every kind with regards to surveys, that that was the true corner of the block.

Q. Have the surveys generally started from that corner in North Marshfield?

By Mr. UPTON.—Objected to as leading and suggestive of the answer sought.

A. So far as I know, they have.

Q. State what the fact is as to the construction of buildings, both West and North as to this corner?

By Mr. UPTON.—Objected to as leading and suggestive of the answer sought, incompetent, irrelevant and immaterial.

A. Well, as to that I could not say, but the parties that have been building along have all seemed to be building on the street on the East side, very little on the West side, and as to the row they put on the East side, as to whether that is exactly correct, could not say, but it has been my understanding from the

fact they were put in a line and it is taken for granted they were.

Q. I understand you have been County Surveyor of this county for upwards of 20 years, have you, during the time you have been surveying, examined the official records of the plat of North Marshfield?

By Mr. UPTON.—Objected to as incompetent, irrelevant and immaterial.

A. Well, yes.

Q. Is there anything in the records by which you can tie this map or plat to any government corner, if not, please explain fully?

By Mr. UPTON.—Objected to as incompetent, irrelevant and immaterial.

A. I could find nothing by which I could connect it with any government survey, no more than two lines drawn on there would indicate a meander line, and nothing to show which was, and could come to no conclusion as to how it should connect.

Q. Is this map connected in any way with the government survey, or are there any figures to indicate that it is connected in any way with the government survey?

By Mr. UPTON.—Objected to for the reason the same is incompetent, irrelevant and immaterial and for the further reason that the map is the best evidence.

A. I could find nothing from which I could understand how it was connected with the government survey, might have been, but I could not find anything, and that was one reason I used the Marks building

as it was the best evidence I could get and a true starting point.

Q. I hand you plaintiffs' Exhibit 3, and will ask you if this is a correct reproduction of the official plat of North Marshfield?

By Mr. UPTON.—Objected to for the reason the same is incompetent, irrelevant and immaterial.

A. I would not say positively unless I had them where I could compare it, it appears to be, but of course I would not state positively, unless I could compare it.

Q. You will please point out the Marks building, from which you took your departure in making this survey?

By Mr. UPTON.—Objected to as incompetent, irrelevant and immaterial.

A. It is here on the Southeast of Block Eight, seems to be drawn in lines on this blue print.

Re-Cross Examination.

(By Mr. UPTON.)

Q. How many buildings North of the Marks building are there?

A. I could not answer right off, quite a number down there, the machine shop, the boat house and various others, the Cold Storage is beyond the angle, there are quite a number of buildings.

Q. The places you refer to at this time in answer to my last question are on the opposite side of the street from the Marks building?

A. Yes, on the East.

Q. How many buildings are there on the same side of the street as the Marks building and to the North?

A. Do not know, I could name some of them.

Q. Give them in their order, if you can?

A. I cannot do that, but there is the skating rink, one or two other buildings, but I paid no attention to them in making the survey.

Q. What buildings had you in mind when you testified a while ago, that the buildings North of the Marks building were evidently constructed on a basis of the true line of the North side of Block Eight?

A. Because they were in line with the Marks building.

Q. Then you do not wish to convey the impression that the buildings North of the Marks building on the same side of the street are not in line with the Marks building?

A. I do not know, I took the East side as there are a good many buildings you can line up from. I measured 30 feet in the middle of the street and took my lines from that on the East side.

Q. But those places are on the opposite side of the street from the Marks building?

A. Yes, on the opposite side of the street.

Q. Are all of the buildings on the opposite side of the street in line?

A. Practically so, practically in line.

Q. Isn't it a fact that the two old buildings, the buildings that were constructed many years ago, the Holland building and the McKnight building for instance, are not in line with each other?

A. Some of those buildings there were rather back a little, further to the East, but quite a number that would indicate very clearly that they were intended to be about in one straight line.

(Witness excused.)

S. B. CATHCART.

A. N. GOULD recalled as a witness on behalf of plaintiff.

Re-Direct Examination.

(By Mr. HALL.)

Q. Mr. Gould, I hand you plaintiffs' Exhibit No. 3, purporting to be plat of North Marshfield and a portion of Bennett's Addition to Marshfield, and ask you if you made that map?

A. I did.

Q. Is this portion marked "North Marshfield" a correct representation from the official map of North Marshfield?

By Mr. UPTON.—Objected to for the reason it is incompetent, irrelevant and immaterial.

A. Yes.

(Witness excused.)

A. N. GOULD.

It is admitted of record by defendants' attorneys that the date of the deed to the property claimed by the defendants is the 15th day of April, 1889.

[Examiner's Certificate.]

*In the Circuit Court of the United States for the
District of Oregon.*

E. A. ANDERSON AND R. B. HERRON,

Plaintiffs,

vs.

THE OREGON COAL AND NAVIGATION
COMPANY, F. S. DOW AND PATRICK
HENNESY,

Defendants.

I, Charles B. Selby, United States Commissioner at Marshfield, Coos County, Oregon, do hereby certify that pursuant to a Commission to me issued out of the above entitled court and in the above entitled cause, empowering and authorizing me as Special Examiner to examine under oath any and all witnesses in above cause that might be brought before me to testify in above cause and to take said testimony and reduce same to writing, do hereby certify that on the 29th and 30th days of March, A. D. 1910, the following named witnesses were produced before me as witnesses on behalf of plaintiffs herein, to-wit: S. B. Cathcart, A. N. Gould, E. W. Bennett, George Rhoda, J. W. Bennett, E. A. Anderson, G. A. Bennett and John Bear; that each of said witnesses, before testifying herein, were by me first duly and legally sworn on their oaths to tell the truth, the whole truth and nothing but the truth herein and each testified in manner and form as shown by their respective testimony hereinbefore shown; that after their said testi-

mony was taken and transcribed each said named witness appeared before me and was given the opportunity to read, examine and correct their said testimony and each did read and correct his respective testimony in his own handwriting in my presence and afterward signed the same before me and in my presence and made oath thereto; and said corrected testimony was thereupon submitted to J. M. Upton and John F. Hall, respectively of counsel for the parties hereto and approved by each; that at all of the time at which said testimony was taken there were present at said taking the respective attorneys for the plaintiff and defendant; that the exhibits hereunto attached marked Exhibits "L," "2," "3," and "4" over the signature of myself as Special Examiner, are all of the exhibits offered and submitted in this cause and that the same are the true and identical exhibits offered in evidence herein and as referred to in the foregoing record; that said record contains all of the testimony submitted before me in this cause and is a true and correct record of the said proceedings before me and all thereof; that the signatures of the said witnesses hereinbefore shown are the true signatures of each respective witness; that said testimony of said witnesses was taken before me upon their oral examination and cross examination by the respective counsel of the parties hereto to-wit: John F. Hall, James Hall and A. S. Hammond for plaintiffs, and J. M. Upton, E. L. C. Farrin and Geo. N. Farrin for defendants;

That said record contains the objections, and all thereof, offered at said taking of said testimony as therein shown and that the stipulation attached on page "-O" at the beginning of this record was signed and filed with me as such Special Examiner prior to the taking of any testimony herein.

That the foregoing constitutes all of the record and proceedings had before me at the hearing hereof and that there is hereto attached my said Commission issued out of the above entitled court and in this cause for the taking of said testimony.

In witness whereof I have hereunto set my hand and affixed my seal as United States Commissioner at my office in Marshfield, Coos County, Oregon, this 2nd day of May, A. D. 1910.

[Seal]

CHAS. B. SELBY,

United States Commissioner and Special Examiner
in above entitled cause, under Commission of
the above entitled court of date November 12th,
1909.

[Endorsed]: Filed May 16, 1910 and opened at
final hearing June 28, 1911. G. H. Marsh, Clerk.

And afterwards, to wit, on Wednesday, the 28 day of
June, 1911, the same being the 68th judicial day of the
regular April 1911, term of said court; present,
the Honorable Charles E. Wolverton, United
States District Judge, presiding, the following
proceedings were had in said cause, to-wit:

[Judgment Entry.]

*In the Circuit Court of the United States for the
District of Oregon.*

No. 3196.

DECREE.

E. A. ANDERSON AND R. B. HERRON,

Plaintiffs,

vs.

THE OREGON COAL & NAVIGATION COM-
PANY, F. S. DOW AND PATRICK HEN-
NESY,

Defendants.

The above entitled cause coming on to be heard in open court, the plaintiffs appearing by John F. Hall, one of their attorneys, and the defendants appearing by J. M. Upton, one of their attorneys,

The Court after hearing the argument of counsel, and being fully advised, finds that the equities are with the plaintiffs, and that the plaintiffs are entitled to the relief prayed for in their complaint.

It is, therefore, hereby Ordered, Adjudged and Decreed that the defendants, and their agents, servants, and employees, be, and they are hereby, enjoined from driving any poles or posts, or erecting any structures, in front of and within the space comprised by the laterals extended to the ships channel of Lots numbered sixteen (16) and seventeen (17), in Block sixty-five (65), in Nasburg's Addition (re-plated as Bennett's Addition), to the Town of Marshfield, Coos County, Oregon, as the same is shown upon the plat

of said addition, recorded in the office of the County Clerk of said Coos County, Oregon, in Book 2 of Plats, page 110, and in Book 3 of Plats, page 51, of the records of said county, or in any way obstructing, occupying or encroaching upon the space between said lots and the ship channel on the navigable waters of Coos Bay, and that this order and decree be perpetual.

It is further Ordered that the plaintiffs recover and judgment is entered against defendants for the costs and disbursements herein.

Dated at Portland, Multnomah County, Oregon, this twenty-eighth day of June, A. D. 1911.

CHAS. E. WOLVERTON,

[Endorsed]: Filed June 28, 1911, G. H. Marsh, Clerk.

And afterwards, to wit, on the 26 day of December, 1911, there was filed in said court a petition for appeal in words and figures, as follows, to wit:

[Petition for Order Allowing Appeal.]

*In the Circuit Court of the United States for the
District of Oregon.*

OREGON COAL AND NAVIGATION COM-
PANY,

Appellant,

vs.

E. A. ANDERSON AND R. B. HERRON,

Appellees.

The aboved named appellants, Oregon Coal and Navigation Company, a corporation, conceiving itself aggrieved by the order and decree made and entered on the 28th day of June, 1911, in the above entitled cause, in the above named court, hereby appeals from said order and decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors, which is filed herewith; and it prays that its appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order and decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated December 26th, 1911.

J. M. UPTON and
J. LE ROY SMITH,
Attorneys for Defendants in Error.

The foregoing appeal is hereby allowed this 26th day of December, 1911.

R. S. BEAN,
Judge.

[Endorsed]: Filed December 26, 1911, G. H. Marsh, Clerk.

And afterwards, to wit, on the 26 day of December, 1911, there was issued out of said court an assignment of error in words and figures, as follows, to wit:

[Assignments of Error.]

*In the Circuit Court of the United States for the
District of Oregon.*

In Equity.

OREGON COAL AND NAVIGATION COM-
PANY,

Appellant,

vs.

E. A. ANDERSON AND R. B. HERRON,

Appellee.

The appellant in the above entitled suit, in connection with its petition for an appeal, make the following assignments of errors, which it avers occurred upon the trial of said cause:

I.

That the Court erred in granting injunctive relief, when the pleadings showed the issue to be a dispute over certain boundary lines.

II.

That the Court erred in finding sufficient proof as to either the point of beginning or ending of the above named appellee's holdings, assuming the Court had acquired jurisdiction.

III.

That the Court erred in assuming jurisdiction, under the issues presented.

IV.

That the Court erred in finding that the "equities

were with the plaintiffs and that plaintiffs are entitled to the relief prayed for in their complaint.”

V.

That the Court erred in considering the exhibits offered in evidence on the part of plaintiffs, the same not being shown authentic, properly identified as plats of the locality represented nor certified as required by law.

VI.

That the Court erred in considering the question of tides presented in the testimony on behalf of appellees, the same coming from unqualified witnesses—and their statements wholly incompetent, irrelevant and immaterial for the purposes offered under objection.

VII.

That the Court erred in granting the relief demanded by appellees, when it lacked jurisdiction to have determined the question of ownership or right of possession of real property.

VIII.

That the Court erred in its failure to find for appellants on the ground of failure of proof, on the part of appellees; and the absence of any proof to sustain the allegations of plaintiffs; and lastly: that because of such error appellant has suffered, or will suffer, irreparable injury if redress does follow forthwith.

J. M. UPTON and

SMITH, LUNDBURG & ULRICH,

Attorneys for Defendants in Error.

[Endorsed]: Assignment of Errors. Filed Dec. 26, 1911, G. H. Marsh, Clerk.

And afterwards, to wit, on the 26 day of December, 1911, there was filed in said court an order allowing appeal in words and figures, as follows, to wit:

[Order Allowing Appeal.]

*In the Circuit Court of the United States for the
District of Oregon.*

No. 3196.

E. A. ANDERSON AND R. B. HERRON,
Plaintiffs,

vs.

OREGON COAL AND NAVIGATION COM-
PANY,

Defendants.

On this 26th day of December, 1911, came the appellant, Oregon Coal and Navigation Company, by J. LeRoy Smith, one of its attorneys, appearing in its behalf, and filed herein and presented to this Court its petition, praying for the allowance of an appeal, intended to be urged by it to the United States Circuit Court of Appeals for the Ninth Circuit, from the decree entered in the above-entitled cause and in the above-entitled court on the 28th day of June, 1911, and also praying that a transcript of the record, proceedings and evidence of papers, on which said decree was herein rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals

for said Ninth District, and such other and further proceedings may be had, as may be proper in the premises.

In consideration whereof, the Court does hereby allow the appeal prayed for in said petition.

R. S. BEAN,
Judge.

[Endorsed]: Order Allowing Appeal. Filed Dec. 26, 1911, G. H. Marsh, Clerk.

And afterwards, to wit, on the 26 day of December, 1911, there was filed in said court an Undertaking on Appeal in words and figures, as follows, to wit:

[Undertaking on Appeal.]

*In the Circuit Court of the United States for the
District of Oregon.*

OREGON COAL AND NAVIGATION COM-
PANY,

Appellant,

vs.

E. A. ANDERSON AND R. B. HERRON,

Appellees.

Know All Men By These Presents, That, we, Oregon Coal and Navigation Company and Pacific Coast Casualty Company, a corporation of San Francisco, Cal., are held and firmly bound unto E. A. Anderson and R. B. Herron in the sum of Five Hundred (500) Dollars, to be paid to the said E. A. Anderson and R. B. Herron, their executors or administrators. To

which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors and administrators or assigns firmly by these presents.

Sealed with our seals and dated **December 26th, 1911.**

Whereas the above named appellant is desirous of appealing to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment in the cause of E. A. Anderson and R. B. Herron, plaintiffs versus Oregon Coal and Navigation Company, F. S. Dow and Patrick Hennessy, defendants, by the Circuit Court of the United States for the District of Oregon, on the 28th day of June, 1911.

Now, therefore, the condition of the obligation is such, that if the above named Oregon Coal and Navigation Company shall prosecute said appeal to effect, and answer all costs on such appeal to said appellees if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

Signed, sealed and delivered in the presence of
OREGON COAL & NAVIGATION COMPANY,
by J. LE ROY SMITH, one of its Attorneys. [LS]

PACIFIC COAST CASUALTY COMPANY, [LS]
By PHILLIP GROSSMAYER, Attorney in
Fact. [LS]

[Seal]

PETTIS-GROSSMAYER CO.,
General Agent.
By PHILLIP GROSSMAYER,
Secty.

The foregoing undertaking approved this 26th day of December, 1911.

R. S. BEAN,
Judge.

[Endorsed]: Bond. Filed December 26, 1911, G. H. Marsh, Clerk.

And afterwards, to wit, on the 10 day of April, 1912, there was filed in said court a citation on appeal in words and figures, as follows, to wit:

[Citation on Appeal.]

United States of America,
District of Oregon,—ss.

To E. A. ANDERSON and R. B. HERRON, Appellees, JOHN F. HALL and A. S. HAMMOND, Esqs., of Counsel for Appellees,
Greeting:

Whereas, Oregon Coal and Navigation Company, a corporation, appellant, has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree rendered in the Circuit Court of the United States for the District of Oregon, and has given the security required by law; you are, of the United States for the District of Oregon, in your favor, and has given the security required by law: you are, therefore, hereby, cited and admonished to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why

the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 26th day of December, in the year of our Lord, one thousand, nine hundred and eleven.

R. S. BEAN,
Judge.

Service of the above citation accepted at Marshfield, Oregon, this 28 day of December, 1911.

JOHN F. HALL, one of Attorneys for Appellees.

[Endorsed]: Filed April 10, 1912, A. M. Cannon, Clerk.

No. 2153.

IN THE

**United States
Circuit Court of Appeals
for the Ninth Circuit**

OREGON COAL & NAVIGATION CO.,
Appellant.

VS.

E. A. ANDERSON and R. B. HERRON,

Appellees.

*Upon Appeal from the United States District
Court, District of Oregon.*

Appellant's Brief

J. M. UPTON, Marshfield, Oregon,
J. LeROY SMITH, Portland, Oregon.
Attorneys for the Appellant.

STATEMENT.

This is a suit in equity.

The complainants (appellees) are the owners of the lots numbered 16 and 17 in the block numbered 65, of Nasburg's Addition (re-platted as Bennett's Addition) to Marshfield, Oregon. (Record p. 51.)

The appellant is the owner of adjoining property which is described in the answer, and which would here be described but that a description thereof would unnecessarily extend this statement and serve no useful purpose. (Record, p. 51 and pp. 40-41.)

Paragraph numbered II. of the complaint reads as follows.

"That said lots are bounded on their Easterly and Northerly side by the low water mark of Coos Bay, which is a navigable body of water wherein the tide ebbs and flows and the plaintiffs as owners of said lots, *also own, as appurtenant thereto, the right and privilege to build docks or wharves out into the waters of*

Coos Bay to the edge of navigable water; and the principal value of said lots arises from the facts that the owners of said lots have such right and privilege and without said right and privilege said lots would be comparatively worthless."

The paragraphs numbered IV. and V. of said complaint are as follows:

"That the defendant, the Oregon Coal and Navigation Company, by its said agents and employees, without any right, permission or authority so to do, did, on or about the..... day of March, 1907, secretly and surreptitiously and in the night time, go upon the submerged lands lying between the plaintiffs' said lots and the navigable waters of Coos Bay and drive therein and thereon numerous piles and posts, which are firmly imbedded in the soil and extend and protrude above the waters of said Coos Bay a distance of from 6 to 12 feet, thus entirely shutting off the plaintiffs to the ship canal and the navigable waters of Coos Bay.

"And the defendants threaten and give forth that they will continue to so drive piles and posts in front of plaintiff's said lots and that they will place timbers and planks thereon and that they will erect structures thereon that will completely cut off the plaintiffs from and prevent all access to the ship canal and the navigable waters of Coos Bay.

"And the plaintiffs believe and so believing

allege that unless prevented by the order of this Court the defendant will so do and plaintiffs allege that such acts will cause great and irreparable injury and damage to plaintiffs and that the amount or extent of such injury could not be measured or ascertained."

"That the plaintiffs have no plain, speedy or adequate remedy at law." (Transcript, pp. 5-6.)

The relief asked is that the defendant (appellant) be enjoined from committing the acts complained of.

The answer denies all of the matters contained in paragraphs II., IV. and V.

Three separate defenses were set out in the answer, but as we view the matter, only one will be necessary to be considered by the Court. It is as follows:

"That as appurtenant to the land above-described, and by virtue of being riparian owners thereof, the said defendant, the Oregon Coal and Navigation Company, has the right and privilege of wharfing out in front of said premises to the navigable waters of Coos Bay.

"That the said land above described and the riparian right and the right to wharf out to the navigable waters of Coos Bay appurtenant to said land included all of the land over which the defendants or any of them have driven

piles or posts or otherwise exercised acts of dominion.

“That the land above described and the riparian rights or right to wharf out to the navigable waters of Coos Bay appurtenant thereto, lie in front of the said Lots 16 and 17 in Block 65, of said Nasburg's addition to the town of Marshfield, Coos County, Oregon, and between the said Lots and the navigable waters of Coos Bay.”

A demurrer was filed to the bill, and overruled. (Record, p. 41 and pp. 38-9.)

Considerable testimony was offered on the part of complainants (appellees), a large part of it being hearsay and the conclusions of witnesses. The evidence tended to show the location of the low water mark in front of, and adjoining the premises described in the bill and answer.

The only testimony in support of the unlawful acts complained of in the bill, i. e., that appellant unlawfully and surreptitiously drove numerous piles and posts in front of the appellees' property described in the bill, entirely shutting off their access to the ship canal and the navigable waters of Coos Bay, and that appellant threatened and gave forth, that it would continue so to do, is contained on pages

76-7 of the record. It is very brief and we will quote it:

“Q. There has been some piling driven in front of your lot and also of Lot 17; will you please explain when and how that was driven?”

“A. It was in 1907, just exactly the time of year I cannot say, but it was in the winter time sometime the piling was driven. They went in there at midnight Saturday night and drove all that night and Sunday and Monday Mr. Hall came to me and said, “you are improving your property I see; you are driving piling.” I said, well if I am I don’t know it. I went down there and they were whacking away on the piles *and I put a stop to it*. If I had known it sooner would have been there before.”

Q. *Do you know at whose instance those piles were driven?*

A. *I do not know exactly, but I think at the instance of Dow and Hennessy.*

Q. Two of the defendants in this suit?

A. Yes, sir.

Q. Were those piles driven with your consent?

A. No, oh, no—I would have had them working day time if it was.”

There was no testimony offered of any kind to the effect that complainants (appellees)

owned, as appurtenant to the premises described in the bill, "the right and privilege to build docks and wharves out into the water of Coos Bay to the edge of navigable water."

Appellant offered no testimony, but challenged the sufficiency of appellees showing, as it had theretofore, by demurrer, challenged the sufficiency of the bill. A decree was entered according to the prayer of the bill in favor of appellees, from which this appeal is taken.

At p. 101, et seq., will be found appellants assignment of errors.

APPELLANT ON THIS APPEAL RELIES UPON AND MAKES THE FOLLOWING SPECIFICATIONS OF ERROR:

1. The bill of ~~the~~ complaint did not state facts sufficient to entitle appellees to any relief in equity.

2. The evidence offered on the part of appellees was insufficient to entitle them to any relief in equity.

3. The relief given appellees was contrary to equity and erroneous.

4. The decree should have been for appellant.

5. A Court of Equity was without jurisdiction, under the pleadings and evidence.

ARGUMENT.

It seems so clear to us from the foregoing statement that complainants (appellees) have (a) mistaken their remedy and (b) have utterly failed in their testimony to make a case of either equitable or legal cognizance, that the foregoing statement of the case should be a sufficient argument of it.

It is evident that the parties had a dispute as to the boundary line between their property, and as to their riparian rights. Appellant being in possession of the disputed area, appellees would recover the possession and determine the respective boundaries, ownership and riparian rights by a suit in equity. This they cannot do; their remedy, if they have one, is at law.

In Hipp et al. vs. Babin et al., 19 Howard

271, it was held (we quote from the syllabus):

“A court of equity will not entertain a bill, where the complainants seek to enforce a merely legal title to land; and in the present case, in the absence of allegations that the plaintiffs are seeking a partition, or a discovery, or an account, or to avoid a multiplicity of suits, the bill cannot be maintained.”

But if during the pendency of an action at law it should be made to appear that they would suffer irreparable damage; in other words if the action at law is inadequate, a suit in equity, *ancillary to the action at law*, could be maintained, to hold the subject of the litigation in statu quo, until the rights of the parties could be determined in the law case. See *Parker vs. Lake Cotton Company*, 2 Black, U. S., 552, where it was said:

“Where an injunction is granted without a trial at law, it is usually upon the principle of preserving the property, until a trial at law can be had. A strong prima facie case of right must be shown, and there must have been no improper delay. The Court will consider all the circumstances and exercise a careful discretion.”

And in *Irwin vs. Dixon* (9 Howard (U. S.), 10), it was said:

“Until the rights of the parties are settled

at law, only a temporary injunction is issued to prevent irreparable injury.”

The judiciary act provides that “suits in equity shall not be maintained in either of the Courts of the United States in any case where plain, adequate and complete remedy can be had at law.” But where the remedy at law *is adequate* the adverse party has a *constitutional right to a trial by jury*. 19 Howard (U. S.), 278. And in Noonan vs. Lee, 2 Black, U. S. 509, the Court said:

“The equity jurisdiction of the Courts of the United States is derived from the Constitution and laws of the United States. Their powers and rules of decision are the same in all the States. Their practise is regulated by themselves, and by rules established by the Supreme Court. This Court is invested in law with authority to make such rules. In all those respects they are unaffected by State legislation. Neves vs. Scott (13 Howard 270); Boyle vs. Zachary Turner, (6 Pet, 658); Robinson vs. Campbell, (3 Wheat. 323).”

Appellees have not brought an action at law, but rely entirely for redress upon this suit in equity. As before stated they allege that they will sustain irreparable damages if the injunction prayed for does not issue, and this is the gravamen of the suit, but when they come to

offer their evidence in support of their bill, they utterly fail to show that appellant committed any of the acts complained of, or that it even threatened to do so. On the contrary appellee Anderson, as we have shown, testified only that someone was driving piles; but he does not even make it clear where the piles were being driven, and states:

“And *I put a stop to it*. If I had known it sooner would have been there before. Q. Do you know at whose instance those piles were driven? A. *I do not know exactly*, but I think at the instance of Dow and Hennessy.” (Record, pp. 76-7.)

That is all the testimony there is on the subject. If appellees had, as he testified, stopped the threatened injury, what was the necessity for an injunction, and where and how are appellees threatened with irreparable injury? Appellant in its answer denied the driving of any piles, and appellee offered no testimony on the subject, except that by appellee Anderson before quoted, wherein he stated he did not know exactly who drove the piles, but he thought that they were driven at the instance of Dow and Hennessy, whoever they may be.

The allegation in the bill that appellees were entitled to wharf out in front of and beyond the

lines of their property described in the bill, is unsupported by testimony of any kind, name or nature. The record is absolutely silent upon the proposition. Appellees may have proceeded, and evidently did proceed, upon the theory that ownership of a town lot, lying in close proximity to navigable water, possesses in law, as one of the incidental appurtenances, the right to wharf out in front of and beyond the lines to deep water. That such rights *do not necessarily* follow and attach to such ownership was plainly and unequivocally decided by the case of *Bowlby vs. Shively*, 152 U. S. 1. Otherwise stated, the rights contended for by appellees depend upon the boundaries of the lots, the nature and character of the title of their grantor, and the source of his title; and also depend upon the nature and character of their conveyance; because, even though their grantor possessed such right, he may not have conveyed it, the deed may have contained a reservation. Until appellees made such showing by proper evidence, no Court could determine what their rights were.

The decree is an absolute, irrevocable adjudication of the boundary line, the ownership and the riparian rights of the parties, and this is

a proceeding wherein they were denied a trial by jury.

The complainant must show not only the existence of his right, but he must show that the acts sought to be restrained will be a violation thereof. There must be what the law regards as a legal injury, not a mere inconvenience.

22 Cyc. 756.

It is not sufficient to authorize the remedy by injunction that a violation of a naked legal right of property is threatened. *There must be some special ground of jurisdiction.*

Id. 757 (note).

Where there is a reasonable doubt as to the right or title of the applicant for an injunction to protect property, equity will not interfere in the absence of an emergency, until the right or title has been established at law.

Id. 819.

L

A Court of Chancery is not the appropriate tribunal for the trial of title to land, and where the main object of a suit asking for relief by injunction is to determine the legal title to property, *or to fix the boundaries of land*, equity will not interfere by injunction but will remit the parties to a Court of law.

22 Cyc. 821.



The principle of injunctive relief against a tort is that whenever damage is caused or threatened to property admitted or legally adjudged to be the plaintiff's, by an act of the defendant, admitted or legally adjudged to be a legal wrong and such damage is not remediable at law, the inadequacy of the remedy at law will warrant an injunction against the commission or continuance of the wrong.

Andries vs. Detroit R. R. Co. (Mich.), 63 N. W. 527.

When a bill alleges matter for the jurisdiction of a Court of equity so that a demurrer will not lie, if it appear at the hearing that the allegations are false, and that such matter does not exist, the result must be the same as if it had not been alleged, and the bill should be dismissed for want of jurisdiction. In other words, when it appears at the hearing of the cause, upon the pleadings and proof offered that the real object of the bill is to settle in a Court of Chancery a *controverted boundary of lands*, it should be dismissed for want of jurisdiction.

Calloway vs. Webster (Va.), 37 S. E. 276.

True, equity will, upon occasion, determine disputed boundaries, but it is not the rule. It is only upon a clear and strong showing, upon

the pleadings and proofs, of the right to injunctive relief in the first instance, that the Court will thus intervene. Here was no such showing. Complainants' right to relief is not evident. There is practically a total absence of first instance or impelling grounds for such relief. It was not shown that the lots were necessary for any particular or useful purpose, or that they were "rendered worthless" for such purpose. There was no interference, no interruption, no annoyance, no embarrassment, no substantial anything which could invoke equitable intervention—even ordinarily.

As we have had occasion heretofore to remark, there is a total want of proof in support of the right of the complainants (appellees) to wharfage privileges, as appurtenant to the lots, or otherwise; they have wholly failed to support the only allegations which could move a Court of equity to entertain the cause in the first instance, and they "stopped" the work before injunction issued.

Respectfully submitted,

J. M. Lupton
J. L. R. Smith

Attorneys for Appellants.

CERTIFICATE.

State of Oregon, }
County of Coos. } ss.

I hereby certify that the foregoing Brief is a true and correct copy of Appellant's Brief and of the whole thereof.

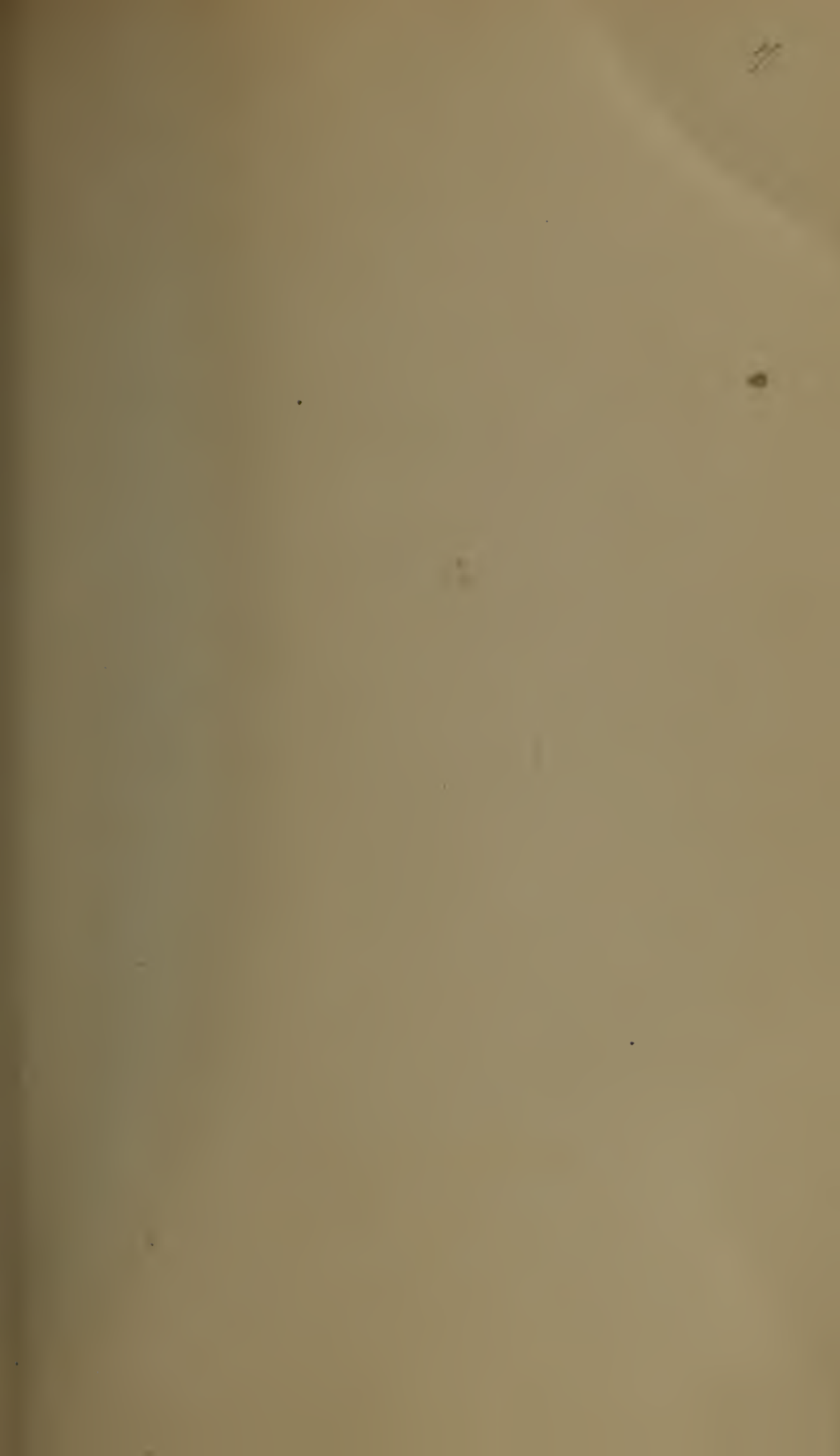
.....
of Attorneys for Appellant.

ACKNOWLEDGMENT OF SERVICE.

County of Coos. }
State of Oregon, } ss.

Due and legal service of Appellant's Brief in the within entitled cause is hereby acknowledged this.....day of, 1912, by the receipt personally within Coos County, Oregon of a duly certified copy thereof.

.....
of Attorneys for Appellees.



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In the
United States Circuit Court of Appeals
for the Ninth Circuit

October Term, 1912
San Francisco, California

Oregon Coal & Navigation Co.,	}	No. 2153.
appellant,		
vs.		
E. A. Anderson and R. B. Her-	}	
ron, appellees.		

BRIEF OF APPELLEES.

STATEMENT.

This suit was brought by the plaintiff appellees for an injunction to restrain the defendant appellant and certain other defendants named in the complaint, from building a wharf in the waters of Coos Bay, Oregon, fronting and abutting upon property owned by the plaintiffs and described as Lots 16 and 17 in Block 65 in Nasburg's Addition (replatted as Bennett's Addition) in the Town of Marshfield, Coos County, Oregon (Trans. pages 4 to 7 inc).

It has been stipulated (Trans. p. 51) that the appellees are the owners of said lots and that the ap-

pellant is the owner of the land described in its answer (Trans. pages 40 to 43 inc.) except in so far as the descriptions of the said premises may conflict, if they do conflict.

The question involved is the right of appellees to an injunction restraining the appellant from constructing a wharf in front of appellees' premises. The trial Court found that the equities were with the plaintiffs and permanently enjoined the defendants from erecting any construction in front of and within the space comprised by the laterals extended to the ships channel, of the appellee's lands (Trans. pages 98-99).

POINTS AND AUTHORITIES.

POINT I.

Appellees, as the Owners of Land Lying upon the Shores of Coos Bay Have the Paramount Right, by Virtue of Their Ownership, to Connect Their Shore Line by Wharves or Piers with the Outside Navigable Water.

The testimony clearly shows that appellee's lands front upon the navigable waters of Coos Bay and that they are chiefly valuable as water front property (Trans. pages 77, 78 and 82). If appellant's westerly line running from the northwest corner of Lot 6 in

Block 5 in the Town of North Marshfield due north to the low water line of Coos Bay, does not meet such low water line at a point within the side lines of appellee's lands extended and it appears from all the testimony taken (See testimony of S. B. Cathcart, Trans. pages 53 to 61 inc. and testimony of A. N. Gould, Trans. pages 63 and 64) and from the exhibits (See particularly Exhibit 3), that it does not, then there can be no question of the paramount right of appellees to have unobstructed access to deep water. The question of the location of appellant's westerly line and of the low water line of Coos Bay will be considered later.

In Oregon the right of riparian owners to wharf out to deep water is secured to them by Statute. This right is defined by Statute as follows: (Sec. 5201 Lord's Oregon Code).

“The owner of any land in this State lying
 “upon any navigable stream or other like
 “water, and within the corporate limits of any
 “corporate town therein, is hereby authorized
 “to construct a wharf or wharves upon the
 “same, and extend such wharf or wharves into
 “such stream or other like water beyond low
 “water mark so far as may be necessary and
 “convenient for the use and accommodation
 “of any ships or other boats or vessels that
 “may or can navigate such stream or other
 “like water.”

The operation of the Oregon Statute has been determined judicially in several Oregon cases:

Parker vs. Taylor, 7 Oregon 436.

Lewis vs. City of Portland, 25 Oregon, 133-134-164-169.

Montgomery vs. Shaver, 40 Oregon 244-247. (66 Pac. 923)

In addition to the Oregon cases there are many other authorities in which this right of riparian owners to have access to navigable water is emphasized.

Dutton vs. Strong, 1 Black (U. S. 1) 17 Law. Ed. 29.

Illinois vs. Illinois C.R.Co. 146 U.S. 387-476.

Shively vs. Bowlby, 152 U. S. 1.

Janesville vs. Carpenter, 77 Wis. 288 (20 Am. St. Rep. 23)

Baltimore vs. St. Agnes Hospital, 48 Md. 419.

Rumsey vs. N.Y. & N.E.R. R. Co. 133 N. Y. 78 (28 Am. St. Rep. 600)

Weber vs State Harbor Commission, 18 Wall 57 (85 Law. Ed. 798)

Farnham on Water and Water Rights, Sec. 113, p. 529; Sec. 113 B. p. 533; Sec. 113 C. p. 539.

POINT II.

The Riparian Owner is Only Entitled to Construct a Wharf In Front of His Land Within a Space Determined by Lines Drawn at Right Angles from the Thread of the Stream to the Shore Termini of the Side Lines of His Land.

In *Montgomery vs. Shaver*, 40 Oregon 245 (66 Pac. 923) the Court says on page 246:

“The right to wharf out to the navigable
“water of a stream is given by Statute to any
“owner of land within the corporate limits of
“any town or city bordering thereon [Hill’s
“Ann. Laws Sec. 4227]. It must be conceded
“that wharfage or wharfing privileges are val-
“ueless unless they extend to navigable water
“or the ship’s channel. It often happens that

“the contour or configuration of a stream is
 “such that if the dividing line of upland own-
 “ers bordering on the margin or line of high
 “water mark is extended by right angles, the
 “owner on one side thereof will be deprived of
 “access to the ships channel; so that, in order
 “to accord to each owner a ratable and equi-
 “table proportion of the navigable stream, the
 “rule has been firmly established * * * that
 “the bounds are to be governed by lines drawn
 “at right angles from the thread of the stream
 “to the shore termini. * * * * The thread
 “of the stream is the unalterable base from
 “which lines drawn at right angles to the
 “shore termini will determine the area subject
 “to the exercise of the wharfing privilege.”

It appears in this case [Trans. pages 68, 80, 81, 82, that some years before the commencement of this suit, the Standard Oil Company constructed a wharf or ware house known as the “Oil House” within the side lines of its property adjoining that of appellee E. A. Anderson, on the north [See exhibit “L” and “3”]. It is immediately south of this building and within the side lines of appellee’s property extended to navigable water that the appellant drove piling on a Saturday night and a Sunday in the winter or spring of 1907, [Trans. pages 66 and 76]. This was done without the consent of the appellees.

It is clear from the testimony [Trans. pages 53 to 61] and from exhibits “L” and “3”, that this piling was not driven within the space where it was permissible for appellant to drive piling and build wharves. Thus driven, the piling was an obstruction which would prevent appellees from having access to the

navigable water in front of their lands.

Other cases bearing upon this phase of the question are

Jones vs. Johnson, 59 U.S. 150.

Dutton vs. Strong, 1 Black [U.S. 1]

Rumsey vs. N. Y. & N. E. R. R. Co., 133 N. Y. 78.

Farnham on Water and Water Rights, Sec. 874, pages 2543-2555.

POINT III.

Appellees' Paramount Right to Use the Space in Front of Their Land for Access to Deep Water is an Easement or a Right Appurtenant to the Upland and Cannot be Taken from Them Without Their Consent or Without Compensation and Cannot in any Event be Taken from Them for a Private Use.

In Farnham on Water and Water Rights, Sec. 113 p. 529, it is said:

“The primary use of the waterway is that of commerce, and the principal aid to commerce is that of navigation, and the wharves and piers are only adjuncts to that right and can never be erected so as to obstruct or interfere with it. Likewise, with reference to adjoining owners, each owner must exercise his own rights in such a way as not to impair the equal rights of his neighbors. He must, therefore, keep his wharf or pier in front of his own property and not construct it in such a way as to prevent the adjoining owner from wharfing out or so as to cut off access to his property.”

See also Farnham on Water and Water rights, Sec. 873, p. 2541.

In *Lewis vs. City of Portland*, 25 Oregon, 133-169, the Court says on pages 168 and 169:

“The right to build and maintain a wharf, being in aid of navigation and for the benefit of commerce, rests upon a different footing and principal from a license to erect mills with dams, which may impede or obstruct navigation or canals diverting the waters of a navigable river.

“Without further reference, it is sufficient to say that we think the plaintiffs have a right of property in their wharf of which they cannot be deprived except in accordance with established law, and if it should be necessary that it be taken or destroyed for the use of a bridge, that it cannot be done without due compensation therefor.” [Citing *Monongahela Nav. Co. vs. U. S.* 148 U.S.312]

In *Rumsey vs. N.Y. & N.E.R.R.Co.*, 133 N. Y. 78, the Court, quoting from *Yates vs. Milwaukee*, 10 Wall. 497 says:

“This riparian right is property and is valuable and though it must be enjoyed in proper subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which when once vested, the owner can only be deprived in accordance with established law, and if necessary that it be taken for public good, upon due compensation.”

In *Janesville vs. Carpenter*, Wis. 20 Am. St. Rep. 23, the Court, speaking of the riparian owner, says:

“Subject to these restrictions, he has the right to use his land under water the same as above water. It is private property under the protection of the Constitution and it can-

“not be taken or its value lessened or impaired,
 “to have for ‘public use’ without compensa-
 “tion or without due process of law, and it
 “cannot be taken at all for any ones private
 “use.”

In the case at bar the appellant had no permission from the appellees to drive the piling or construct any wharf or pier and as soon as the appellees were aware of what was being done, they stopped the work [Trans. p. 76]. Although appellant attempted by its answer to set up the defense of prescriptive use and adverse possession for more than ten years, no attempt was made to maintain this defense.

The conduct of appellant was an apparent attempt to appropriate property belonging to appellees without making or offering to make any compensation therefor or attempting to first establish a right to take it for a public use.

In Farnham on Water and Water Rights, Sec. 873, p. 2542, it is said:

“The right of constructing wharves is a
 “*right appurtenant to the upland* and may there-
 “fore, be lost to upland owners by prescrip-
 “tion.”

As already noticed, the appellant set up a claim of occupation and prescriptive user of the property for the statutory period as one of its defenses but offered no testimony to substantiate such defense. The testimony clearly shows that appellees and their predecessors in interest occupied the space where appellant attempted to construct a wharf within five or six years prior to the commencement of this suit.

[See Trans. pages 70, 71, testimony of George Rhoda].

POINT IV.

An Injunction is the Proper Remedy Where the Riparian Owner Has Good Reason to Apprehend That a Defendant is About to Encroach Upon his Right of Easement in Such a Manner as to Cause Him Irreparable and Material Injury and Cut Off his Access to Navigable Water.

In *Parker vs. Taylor*, 7 Oregon, 423, the Court says: pages 422-443.

“The questions presented in the complaint
 “are matters within the jurisdiction of a Court
 “of equity. The complaint shows that the
 “respondent is the owner of land immediately
 “above high water and of the adjoining tide
 “lands and claims that he has a right to build
 “a wharf or wharves on these lands and to ex-
 “tend them beyond low water, and that he
 “threatens to continue and maintain these
 “construction and continue to interfere with
 “respondent’s use of this property, and asks
 “for an injunction to restrain appellant from
 “the continuance of these unlawful acts.
 “Welch being the owner of the shore, has, by
 “the law of the State, a right to build a wharf
 “or wharves on the land in question and re-
 “claim it from the water. This he cannot do
 “unless Taylor is enjoined from placing ob-
 “structions in the way of his contemplated im-
 “provement. It is the threatened interference
 “with the future enjoyment of Welch’s fran-
 “chise that he complains of and asks to be
 “protected against by injunction. This an
 “action of trespass or for a nuisance could not
 “reach, *and the proper remedy is by an injunc-*
 “*tion.*”

It seems to be the general rule that the enjoyment of an easement will be protected by an injunction.

See *Kittle vs Pfeifer*, 22 Cal. 484.

Stallard vs. Cushing, 76 Cal. 472.

Lathrop vs. Elsner, 93 Mich. 599.

Vestal vs. Young, 147 Cal. 721.

Appellee Anderson testifies (Trans. p. 76) that he purchased Lot 16 in Block 65 of Nasburg's or Bennett's Addition with the understanding that he was to use it as a coal yard for the reason that the dredgings were interfering with access to other lands which he owned. In 1907 he was informed that piles were being driven in front of his property without his consent. The lots are principally valuable for their water front and the effect of the piling driven by the appellant would be to shut appellees off from deep water (Trans. p. 77). He further testifies (Trans. p. 78) that he could not use his property for the purpose he intended and that the piling was driven in front of his property pretty close to the ships channel; that his lot and the lot adjoining belong to appellee Herron is valuable as ware house property and that the ship channel passing these lots is the main ships' channel to the sea.

From all the testimony it seems there can be no question about appellee's property being water front property and that it is valuable because it is so situated as to have access to the navigable waters of Coos Bay. The ship's channel to the sea runs directly in

front of the property and appellee Anderson purchased his lot for the express purpose of using it for a coal yard and because there he could land a coal scow. Appellant surreptitiously and in the night time and on a holiday sent in its men and machinery and drove piling in considerable quantity and with the apparent purpose of using the space directly in front of appellee's land for the building of a wharf or some landing place or structure [Trans. p. 66]. This was clearly an interference with appellee's right or easement and shut them off from all access to the ships channel and the navigable waters of Coos Bay. Appellant admits in its answer [Trans. p. 41] that it drove the piling claiming the right to do so. From the pleadings and all the testimony and the exhibits, there can be no doubt as to the location of the piling driven by the appellant in front of appellee's property. Appellant moreover asserts its right to build a wharf in the place where the piling was driven. Appellees respectfully submit that this is a case where they have no speedy or adequate remedy at law and that an injunction is the proper remedy. The threatened irreparable injury to appellee's easement and interference with their right to wharf out is an injury which should be prevented and in this case was properly prevented by a permanent injunction. This case is so similar to the case of *Parker vs. Taylor*, 7 Oregon, 324, from which we have cited above, that we fail to see where there is any merit in appellant's first specification of error.

POINT V.

It Was a Question of Fact to be Determined by the Trial Court Whether Appellant's Property as Described in Its Deed Lay in Front of Appellee's Lots and This Fact could be Proved by any Evidence Competent to Prove Any Fact, Even by Parole Evidence.

Appellant seems to rely principally upon the proposition that this suit is based upon a dispute over certain boundary lines and that the Court lacked jurisdiction to grant injunctive relief and finds fault with the manner in which the location of appellee's and appellant's land was determined. (See Trans.p. 101.)

The Court found as a fact that the equities were with the appellees and that they were entitled to the relief prayed for in their complaint and enjoined the appellants from driving any poles or posts or erecting any structure in front of or within the space comprised by the laterals extended to the ships channel of appellee's lots, or in any way obstructing, occupying or encroaching upon the space between said lots and the ships channel on the navigable waters of Coos Bay. If, from all the evidence, it appeared as matter of fact that no portion of appellant's property lies in front of appellee's lots then the trial Court had jurisdiction to and properly did grant the injunction prayed for. It is too late to controvert the proposition that what constitutes the boundary in a deed is a fact for the jury and may be proved by any kind of evidence, which is competent to prove any

fact and that parole evidence is permissible to fix a boundary.

Raymond vs. Coffey, 5 Oregon, 132-134.

Blake vs. Doherty, 5 Wheaton, (U.S.) 359-370.

Shaver vs. Adams, 37 Ore. 282-286 (60 Pac. 902)

City of Racine vs. Emerson, 85 Wis. 80 (39 Am. St. Rep. 819).

Boehreinger vs. Creighton, 10 Oregon, 42. 2 Am. & Eng. Ency. of Law, 1st Ed. p. 501.

The testimony shows, as a fact, that the land owned by the appellant does not extend in front of the land owned by the appellees at any point except at extreme low tide where about five or six feet only extends in front of Lot 17. The point of intersection of appellant's westerly line with the line of mean low tide of Coos Bay is wholly without the space in front of appellee's lots, (See testimony of S. B. Cathcart, Tran. pages 53, 54, 55) and Exhibit "L" and also testimony of A. N. Gould, (Trans. pages 62, 63 and 64) and Exhibit "3". These exhibits are plats that were made by the surveyors from actual measurement and surveys made upon the ground, and Exhibit "3" is a true plat of the land in dispute.

It appears also from the testimony of Mr. J. W. Bennett (Trans. pages 71-74) that there has been no change in the tide lines since the survey of the original plat. It will be observed from an examination of the plats that appellant's land is described as commencing at the northeast corner of Lot 6 in Block 5

of the town of North Marshfield, Coos County, Oregon according to the plat of said town prepared by James Aiken (Trans. p. 42) and it will be observed that by this description the appellant itself must rely upon the location of the northwest corner of said lot 6 in order to establish the boundary of its property. The testimony further shows that the only ascertained and certain point from which a survey could start was the southeast corner of the Marks Building at the southeast corner of Block 8 in North Marshfield (Tran. pages 60, 89 and 90). There was nothing by which the survey could be connected with any Government survey (Trans. p. 91). This brings us naturally to the question of the location of appellant's westerly line and the manner of its determination.

POINT VI.

Any Ascertained Monument in the Survey May be Adopted As a Starting Point and the Location Thereof Established by Parole Evidence.

2 Am. & Eng. Ency. of Law, (1st Ed) p.501.

Ayers vs. Watson, 137 U. S. 584.

Racine vs. Emerson, 85 Wis. 80 (39 Am. St. Rep. 819)

Boehreinger vs. Creighton, 10 Oregon 42.

Terris vs. Coover, 10 Cal. 624.

Colton vs. Seavey, 22 Cal. 497.

Raymond vs. Coffey, 5 Oregon, 134.

Orena vs. City of Santa Barbara, 91 Cal.621.

It appears from the testimony that soon after the surveying and platting of North Marshfield, a building was constructed by one F. Mark at the southeast corner of block 8 [Trans. p. 85]. Piles were driven for the foundation of this building and John Bear who was living at Marshfield at the time the survey was made, says that the southeast corner of the Marks building [Trans. p. 87] is right on the corner. That corner has been recognized as the true corner of said block ever since the platting of the town. Mr. Cathcart, in correcting his testimony above referred to [Trans. p. 89] explains that he made other surveys and that the corner of the Marks Building was always recognized as the true corner of the block.

In *Orena vs. City of Santa Barbara*, 91 Cal. 621, certain surveyor's stakes marking street corners had disappeared. In discussing the question as to the location of street lines, the Court says:

“But the initial point and base-line, if they
 “had been marked on the map, and returned
 “in the notes of the survey, instead of existing
 “only in the memory of the surveyor, as they
 “did in this case, would not be necessarily
 “more controlling than other ascertained
 “points in the survey in ascertaining the ac-
 “tual location of streets and blocks; whether
 “the initial point be of greater or less import-
 “ance than other ascertained points, would
 “depend on circumstances, their proximity
 “and relation to the point to be located.

“In determining the line of the street, meas-
 “urements on that street would naturally be
 “of more value than elsewhere, and if they,

“or the places where they were, cannot be located, it would be important to ascertain the boundaries of the street as actually opened and used; and if such location has been generally acquiesced in by the public, by lot-owners and the municipality, in the absence of more certain evidence, it will be conclusive.”

Appellant objects to the introduction of the plats and the testimony of the surveyors for the reason, among other things, that the survey did not start from the original point. Appellees contend that the cases just cited and the authorities mentioned under Point V. above, settle this point.

It was held in *Black vs. Doherty*, 5 Wheaton [U.S.] 359 [see particularly page 370] and the other authorities cited under Point V. above, that it is too late to controvert the proposition that what constitutes a boundary in a Deed is a fact for the jury and may be proved by any kind of evidence which is competent to prove any fact and that parole evidence is permissible to fix a boundary.

In *City of Racine vs. Emerson*, 85 Wis. 80, the Court says:

“Monuments set by surveyors in the ground and named and referred to in the plat are the highest and best evidence. If there are none such, then stakes set by the surveyors to indicate corners of lots or blocks or the line of streets at the time or soon thereafter, are the next best evidence. The building of a fence or building according to such stakes,

“while they were present, become monuments
 “after such stakes have been removed or dis-
 “appeared, and the next best evidence of the
 “true line.”

In *Ralston vs. Miller*, 3 Rand.44 [15 Am.Dec.704]
 it is said:

“The ancient reputation of possession in re-
 “spect to the locations of streets is entitled to
 “more respect in determining the parole of
 “lines than in any experimental survey that
 “can be made.”

We submit the testimony in this suit shows that the original survey stakes could not be located and that the southeast corner of the Marks Building was the southeas corner of the block from which the survey was started and that this corner has always been recognized as the true corner and starting point for all surveys made in the town of Marshfield for nearly forty years (Trans. pages 85 and 89).

The testimony of the surveyors as to the manner of making the survey and plats is the best evidence obtainable and is competent to prove the location of the true corners of the several blocks in North Marshfield and that the plats made from such surveys are entitled to due credit. (See the testimony of A. N. Gould who made the plat of North Marshfield and a portion of Bennett's Addition to Marshfield showing the location of the lands of appellant and appellees and the starting point for the survey (Tras. p. 94).

The survey of appellant's land made according to

the descriptions in appellant's Deed and commencing at the northwest corner of Lot 6 in Block 5 of the town of North Marshfield, located with reference to the established and recognized street lines and block boundaries of North Marshfield, clearly shows that the appellant's line does not extend to the point in front of appellee's lots where the appellants attempted to construct the wharf complained of.

We submit that the appellees were entitled to the injunction restraining the appellant, its agents and employees, from constructing the wharf in front of appellee's lots or in any way obstructing or encroaching upon the space between their lots and the ships channel on the navigable waters of Coos Bay.

Respectfully submitted,

A. S. HAMMOND,

Address, North Bend, Oregon;

JOHN F. HALL,

Address, Marshfield, Oregon;

EDMUND NELSON,

Address, 26 Montgomery Street,

San Francisco, California,

Attorneys for Appellees.

JAMES T. HALL,

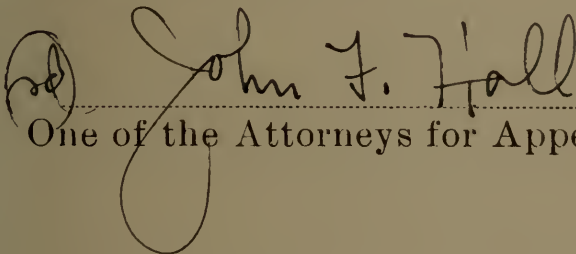
Address, Marshfield, Oregon,

Counselor for Appellees.

CERTIFICATE.

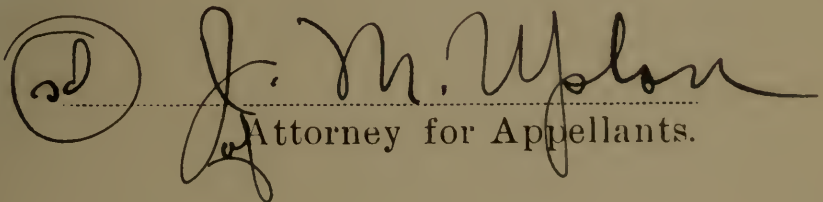
United States of America, }
 State of Oregon, } ss.
 County of Coos. }

I hereby certify that the foregoing Brief is a true and correct copy of Appellees' Brief herein and of the whole thereof.


 One of the Attorneys for Appellees.

ACKNOWLEDGEMENT OF SERVICE.

I hereby acknowledge service of Appellees' Brief in the within entitled cause on me in Coos County, Oregon, this. 27... day of ~~October~~ *September*, 1912, by receipt personally of a duly certified copy thereof.


 Attorney for Appellants.

